No. 12960

United States
Court of Appeals
for the Ninth Circuit.

HARDWARE MUTUAL INSURANCE CO. OF MINNESOTA, a Corporation,

Appellant,

vs.

MILDRED A. DUNWOODY, HAROLD A. GOLDMAN, MYRTLE GOLDMAN, HAROLD F. BARUH and DORIS G. BARUH,

Appellees.

Transcript of Record

**Appeal from the United States District Court,
Northern District of California,
Southern Division.**

Phillips & Van Orden Co., 870 Brannan Street, San Francisco, Calif.

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF ATTORNEYS

BERT W. LEVIT,
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Attorneys for Appellees, Harold A. Goldman, Myrtle Goldman, Harold F. Baruh and Doris G. Baruh.

In the District Court of the United States for the Northern District of California, Southern Division

No. 29584

HARDWARE MUTUAL INSURANCE CO. OF MINNESOTA, a Corporation,

Plaintiff,

vs.

MILDRED A. DUNWOODY, HAROLD A. GOLDMAN, MYRTLE GOLDMAN, HAROLD F. BARUH, DORIS G. BARUH, and SECURITY INSURANCE COMPANY OF NEW HAVEN, a Corporation,

Defendants.

COMPLAINT FOR DECLARATORY RELIEF

Plaintiff alleges:

I.

The jurisdiction of this Court arises out of the fact that the parties are citizens of different states, and the amount in controversy is in excess of $3000 exclusive of interest and costs; this is a suit brought pursuant to the Federal Declaratory Judgment Act (28 USC 400), in a case of actual controversy between plaintiff and defendants; all as more fully hereinafter appears.

II.

The plaintiff is a corporation incorporated under the laws of the State of Minnesota. The plaintiff is now and for many years past continuously has

been engaged in business as an insurance underwriter in and by authority of the several states of the United States, including the State of California. The principal office of the plaintiff in the State of California is located at San Francisco.

III.

Defendant Security Insurance Company of New Haven is a corporation incorporated under the laws of the State of Connecticut. It is now and for many years past continuously has been engaged in business as an insurance underwriter in and by authority of the several states of the United States, including the State of California. Plaintiff alleges, on information and belief, that the principal office of said defendant in the State of California is located at San Francisco.

IV.

Each of the other defendants is a resident and citizen of the State of California, and not a resident or citizen of the State of Minnesota.

V.

On or about 24 September, 1948, plaintiff did, in California, issue and deliver to defendant Mildred A. Dunwoody its policy of insurance No. 4-24777 (Old California Standard Form Fire Insurance Policy), insuring said defendant against loss by fire for the term of 24 September, 1948, to 24 September, 1949, in the amount of $10,000. Said insurance was apportioned as follows: Item 1. $8,000 on one story composition roof brick building at 223-225 Main Street, Chico, California; and Item 4. $2,000

on the one story brick building with composition roof situated at 227-229 Main Street, Chico, California.

VI.

At all times mentioned in this complaint said premises at 223-229 Main Street, Chico, California, were leased to defendants Harold A. Goldman, Myrtle Goldman, Harold F. Baruh, and Doris G. Baruh under a written lease for a term of 50 years commencing 1 January, 1944. Paragraph 12 of said lease states:

> "12. Should the whole or any part of any building or buildings at any time standing on the demised premises be partially or totally destroyed by fire after the commencement of the term hereof, the same shall be restored by the Tenant at its own expense without unnecessary delay * * *"

VII.

At all times mentioned in this complaint there was in full force and effect a policy of insurance No. 64539 (Old California Standard Form Fire Insurance Policy) issued by defendant Security Insurance Company insuring defendants Mildred A. Dunwoody, Harold A. Goldman, Myrtle Goldman, Harold F. Baruh, and Doris G. Baruh against loss or damage by fire to said buildings at 223-229 Main Street, Chico, California, in the amount of $36,795.00.

VIII.

The buildings described in said policies of insurance were totally destroyed by fire on 8 April, 1949.

IX.

Defendant Mildred A. Dunwoody has made a demand upon the plaintiff for the sum of $10,000.00, being the full amount of the policy of fire insurance issued by plaintiff to said defendant. It is the position of plaintiff that said defendant has suffered no loss as defendants Harold A. Goldman, Myrtle Goldman, Harold F. Baruh and Doris G. Baruh are required under their lease with defendant Mildred A. Dunwoody to restore the buildings destroyed by said fire without unnecessary delay.

X.

In the event this Court should determine that defendant Mildred A. Dunwoody has suffered a loss within the meaning of the policy issued to her by plaintiff and directs plaintiff to pay said loss within the limits of said policy, plaintiff will then be subrogated to said defendant's rights against defendants Harold A. Goldman, Myrtle Goldman, Harold F. Baruh and Doris G. Baruh under her lease with them. In order to avoid circuity of action and a multiplicity of suits, judgment should then be entered in favor of plaintiff and against defendants Harold A. Goldman, Myrtle Goldman, Harold F. Baruh and Doris G. Baruh for the amount thus found to be due to defendant Mildred A. Dunwoody.

XI.

In the event that this Court should determine that defendant lessees have no duty to restore the buildings destroyed by fire or to pay for the value

of said buildings, the question will then arise as to the apportionment of the loss between plaintiff and defendant Security Insurance Company. Plaintiff is informed and believes that the sound value of said buildings was $33,553.98. The policy issued by plaintiff in the amount of $10,000.00 constitutes 21.37% of the total fire insurance of $46,795.00 covering upon said buildings. Therefore, plaintiff should not be liable for more than 21.37% of the loss, or $7,170.49.

Wherefore, plaintiff prays:

(1) That the Court adjudge that the plaintiff is not liable to defendant Mildred A. Dunwoody in any amount whatsoever;

(2) That should the Court decree that plaintiff is liable to defendant Mildred A. Dunwoody, the Court will determine the amount of said liability and enter judgment against defendants Harold A. Goldman, Myrtle Goldman, Harold F. Baruh and Doris G. Garuh for said amount.

(3) That plaintiff recover its costs of suit herein; and

(4) That plaintiff have such other and further relief as the Court may deem proper.

BERT W. LEVIT,
DAVID C. BOGERT,
LONG & LEVIT,
By /s/ DAVID C. BOGERT,
Attorneys for Plaintiff.

[Endorsed]: Filed March 21, 1950.

[Title of District Court and Cause.]

AMENDED ANSWER OF DEFENDANTS HAROLD A. GOLDMAN, MYRTLE GOLDMAN, HAROLD F. BARUH AND DORIS G. BARUH

Now come the defendants Harold A. Goldman, Myrtle Goldman, Harold F. Baruh and Doris G. Baruh, and answering plaintiff's complaint on file herein admit, deny and aver as follows:

I.

Admit the allegations of paragraphs I, II, III, IV and VIII of said complaint.

II.

Admit the allegations of paragraph V of said complaint, and in said behalf these defendants aver that said policy of insurance provides that

> "Subrogation: If this company shall claim that the fire was caused by the act or neglect of any person or corporation, this company shall on payment of the loss be subrogated to the extent of such payment to all right of recovery by the insured for the loss resulting therefrom and such right shall be assigned to this company by the insured on receiving such payment,"

and further,

> "Subrogation Waiver Clause: This insurance shall not be prejudiced by agreement made by the named insured releasing or waiving this company's right of subrogation against third

parties responsible for the loss under the following circumstances only:

"(I) If made before loss has occurred, such agreement may run in favor of any third party,"

and does not confer upon said plaintiff any right of subrogation with respect to any contract entered into by the insured with any third party; and, as these defendants are informed and believe and therefore aver, said policy does not contain a depreciation insurance endorsement and the coverage of said policy does not include depreciation.

III.

Admit the allegations of paragraph VI of said complaint save to the following extent: That the allegation respecting paragraph 12 of said lease constitutes but a portion of said paragraph and that said paragraph of said lease is as follows:

Should the whole or any part of any building or buildings at any time standing on the demised premises be partially or totally destroyed by fire after the commencement of the term hereof, the same shall be restored by the Tenant at its own expense without unnecessary delay. The Tenant covenants and agrees that it, the Tenant, shall at all times during the term hereof and at its own expense keep any and all buildings or improvements now upon or hereafter constructed or placed upon said premises, insured against loss or damage by fire in an amount equal to eighty (80) per cent of the full

insurable value thereof above the foundation walls. All such policies of insurance shall be payable to the Landlords and Tenant as their interest may appear, and shall be written by solvent fire insurance companies authorized to do business in the State of California. Such Policies of insurance shall be held by the Tenant, and the Landlords shall be furnished with the usual certificates from insurance companies showing the existence of such policies. In case of loss, the Tenant is hereby authorized to adjust the loss and execute proofs thereof in the names of both the Tenant and the Landlords. So long as the Tenant shall comply with the provisions of this lease respecting fire insurance, the Landlords covenant and agree not to carry or permit to be carried during the term or any extension or renewal thereof, any additional or other fire insurance covering any interest in the demised premises without the knowledge and consent of the Tenant, but if the Landlords shall desire to carry additional insurance and request the tenant to consent thereto, its consent shall not be unreasonably withheld when any such insurance shall not jeopardize or decrease the amount recoverable under the insurance or self insurance herein provided to be carried by the Tenant. The Tenant shall, upon the request of the Landlords furnish the Landlords evidence of is compliance with these provisions and of the fact of coverage adequate in the premises.

Notwithstanding anything else herein con-

> tained to the contrary, if the premises or a portion thereof be damaged by fire, upon the payment of the insurance by the insurance company of the loss to the parties hereto as their interests may appear, all of such payment may be used by the Landlord for the purpose of restoring the portion damaged if the Landlord desires,

and further aver that said defendant Mildred A. Dunwoody sought and received the consent of these defendants to carry insurance upon the said building or buildings in addition to the insurance thereon theretofore effected by these defendants and then in effect and in effect at the time of said fire, and that pursuant to said consent said defendant Dunwoody insured her interest as owner of said property with said plaintiff and which insurance was covered and evidenced by plaintiff's said policy No. 4-24777.

IV.

With respect to paragraph VII of said complaint, these defendants deny the allegations thereof save that at the time of said fire there was in full force and effect a policy of fire insurance No. 64539 issued by defendant Security Insurance Company covering said buildings in the amount of $36,795.00, and in said behalf these defendants aver that the insured named in said policy were the defendants Harold F. Baruh and Harold Goldman and/or M. Dunwoody and that loss thereunder was to be adjusted with and payable to said Harold F. Baruh and Harold Goldman; that said policy contained a de-

preciation insurance endorsement and thereby insured the replacement cost of said buildings without deduction for depreciation.

V.

With respect to paragraph IX of said complaint, these defendants deny that said defendant Dunwoody has suffered no loss under the said policy of fire insurance issued by said plaintiff to said defendant, whether for the reason set forth in said paragraph IX or for any other reason. These defendants aver that the construction of a building or buildings in replacement of the said buildings destroyed by said fire has not been undertaken as yet, and that the same has been delayed by these defendants with the consent and approval of said defendant Dunwoody pending, initially, the efforts of these defendants to procure recognition by Montgomery Ward & Co., Incorporated, of a sublease dated February 25, 1946, from these defendants to it of the said property, under which these defendants agreed to construct upon the said realty a new building for said Montgomery Ward & Co., Incorporated, and to pay the cost thereof up to the sum of $327,500; that these efforts have proved unsuccessful and that within the last several months these defendants have given, and presently are giving, their attention to the procurement of a tenant of substantial worth for said property, carrying with it the construction thereon by these defendants of a building suitable for the conduct thereon of the business of such tenant, and that the cost of the

construction of such building or, in the event of inability to procure such tenant, the cost of the construction on said property of one or more buildings to meet the requirements of the ordinary tenant or tenants will, as these defendants are informed and believe and therefore aver, substantially exceed the aggregate of the gross amount of the insurance provided for by said policy of said Security Insurance Company, namely, $36,795.00, and by said policy of said plaintiff, namely, $10,000.00.

VI.

Respecting paragraph X, these defendants deny that said plaintiff will, in the instance specified in said paragraph, be subrogated to the defendant Dunwoody's rights against these defendants or any of them under the defendant Dunwoody's lease with these defendants or otherwise or at all, and further deny that at any time since the occurrence of said fire there was or presently is or hereafter will be any amount due from these defendants or any of them to said defendant Dunwoody under the aforesaid paragraph 12 of said lease, and further deny that for any reason whatsoever any judgment should be entered in favor of plaintiff and against these defendants or any of them for any amount.

VII.

Respecting paragraph II of said complaint, these defendants deny that there is any right of apportionment of the said loss between said plaintiff and defendant Security Insurance Company, and, upon information and belief, further deny that the sound

value of said buildings was at the time of said loss the sum of $33,553.98, and in said behalf these defendants aver, upon information and belief, that the sound value of said buildings was at the time of said loss not less than the sum of $46,975.57 without depreciation and was not less than the sum of $35,-231.68 after deduction of depreciation. These defendants aver that said Security Insurance Company did accept the immediately above-averred sound value before and after depreciation and did find that there was a total loss, after the deduction of depreciation, under its policy and the said policy of plaintiff, and did pay unto the defendants Harold F. Baruh and Harold A. Goldman, upon the basis of a total loss, the sum of $25,051.11 as the proportion of the gross amount, after deduction of depreciation, of the policy issued by said Security Insurance Company, and did and does withhold the balance, or the sum of $11,743.89, of said gross amount, which balance constitutes the depreciation arrived at by it, and did, and presently does, recognize its liability to said defendants Harold F. Baruh and Harold A. Goldman to pay said amount of $11,743.89 upon the replacement of the destroyed buildings, which course of withholding and time of payment are in conformity with the provisions of the said depreciation insurance endorsement. That, as these defendants are informed and believe and therefore aver, the percentage of said depreciation was agreed to by said plaintiff and said Security Insurance Company in or about the month of June, 1949, and that the agreed percentage was adhered

to by said Security Insurance Company in the aforesaid determination by it of the said amount of depreciation.

These defendants are informed and believe and therefore aver that defendant Dunwoody did, within the time provided for by the said policy issued to her by said plaintiff, render to said plaintiff an amended proof of loss, signed and sworn to by her, setting forth therein the information called for by said policy and claiming therein a total loss under said policy.

As a Further, Separate and Second Defense to plaintiff's complaint on file herein these defendants aver as follows:

I.

That the premises at 223-229 Main Street, Chico, California, were at all times mentioned in said complaint and now are, leased by defendant Mildred A. Dunwoody to these defendants under a written lease for a term of fifty (50) years commencing January 1, 1944. That paragraph 12 of said lease is set forth in paragraph III of the first defense herein and these defendants re-aver and incorporate the same herein, by reference thereto.

II.

That in April, 1946, defendant Mildred A. Dunwoody and these defendants entered into an agreement in writing, a copy of which is hereunto annexed, marked Exhibit "A," and incorporated

herein by reference as though herein fully at length set forth.

III.

That in April, 1946, defendant Mildred A. Dunwoody and defendants Harold F. Baruh and Harold A. Goldman entered into an agreement in writing, a copy of which is hereunto annexed, marked Exhibit "B," and incorporated herein by reference as though herein fully at length set forth.

IV.

That on the 29th day of April, 1946, and within six months from the date of the execution and delivery of the aforesaid agreement marked Exhibit "A," these defendants, as "Landlord," and Montgomery Ward & Co., Incorporated, as "Tenant," entered into a sublease dated the 25th day of February, 1946, of the premises referred to in paragraph I hereof for a term in excess of thirty (30) years commencing on the 1st day of March, 1946.

V.

That as provided in said agreement marked Exhibit "A," upon the execution and delivery thereof, said paragraph 12 of the aforesaid lease became of no force and effect whatsoever.

VI.

That by reason of said agreement marked Exhibit "A," these defendants are not required under their aforesaid lease with defendant Mildred A. Dunwoody, or at all, to restore the buildings referred

to in paragraph I hereof, which were totally destroyed by fire on April 8, 1949.

Wherefore, these defendants pray that this Court do render its judgment that plaintiff is not entitled to any relief under its said complaint; that plaintiff's said complaint be dismissed and that this Court award these defendants their costs and disbursements herein and such other and further relief as this Court may deem meet in the premises.

OSCAR SAMUELS and

TEVIS JACOBS,

By /s/ OSCAR SAMUELS,

Attorneys for Defendants Harold A. Goldman, Mrytle Goldman, Harold F. Baruh and Doris G. Baruh.

Consent is hereby given to the filing of the foregoing amended answer and service of a copy thereof is hereby admitted this day of November, 1950.

BERT W. LEVIT,

DAVID C. BOGERT,

LONG & LEVIT,

By /s/ DAVID C. BOGERT,

Attorneys for Plaintiff.

EXHIBIT "A"

This Supplemental Agreement, made as of the 16th day of April, 1946, between Mildred Dunwoody, an unmarried person, of Chico, California, hereinafter called the Landlord, and H. A. Goldman and Myrtle Goldman, his wife, and H. F. Baruh and Doris G. Baruh, his wife, of Alameda County, California, hereinafter called the Tenant, amending that certain lease dated the First (1st day of November, 1943, by and between the said Mildred Dunwoody, her heirs and assigns, therein called the Landlord, and The Grand Rapids Furniture Company, its heirs and assigns, therein called the Tenants, which lease dated November 1, 1943, was assigned by The Grand Rapids Furniture Company, Harry Polse and Reva Polse and Mary Louise Unger to H. A. Goldman and H. F. Baruh by instrument dated April 3, 1945, and which lease covers certain real property situated in the City of Chico, County of Butte and State of California, described as follows:

> Being a portion of Lots Two (2) and Three (3) in Block Nine (9) of the City of Chico, according to the Official Map thereof, filed and of record in the office of the Recorder of the County of Butte, State of California, and more particularly described as follows, to wit:
>
> Commencing at a point on the Westerly side of Wall Street, distant Ninety-nine (99) feet in a Southerly direction from the northeasterly corner of Lot One (1) of said Block Nine (9); thence at right angles westerly and parallel with

Second Street, One Hundred and Thirty-two (132) feet to the Westerly line of said Lot Two (2); thence at right angles Southerly along the Westerly line of said Lots Two (2) and Three (3), Sixty-three (63) feet to a point distant Thirty-six (36) feet in a Northerly direction from the Southwesterly corner of said lot Three (3); thence at right angles Easterly and parallel with the Southerly line of said Lot Three (3), One Hundred and Thirty-two (132) feet to the Westerly line of Wall Street; thence Northerly along the Westerly line of Wall Street, Sixty-three (63) feet to the place of beginning.

A portion of Lot Six (6) in Block Nine (9) of the City (formerly town) of Chico, according to the official map thereof, filed in the office of the Recorder of the County of Butte, State of California, and more particularly described as follows, to wit:

Commencing at a point on the northeasterly line of Main Street, 17 feet southeasterly from the northwest corner of said Lot 6; and running thence southeasterly along the line of Main Street, 24½ feet; thence northeasterly at a right angle with Main Street, 132 feet to the northeasterly line of said Lot 6; thence northwesterly along the easterly line of said Lot 6, 24½ feet; thence southwesterly and parallel with Third Street, 132 feet to the point of beginning.

Excepting Therefrom the following, to wit:

Commencing at a point on the northeasterly

line of Main Street, 24½ feet northwesterly from the southwest corner of said Lot 6; thence northwesterly along said line of Main Street, 9 feet; thence northeasterly at a right angle with Main Street and parallel with Third Street, 132 feet to the northeasterly line of said Lot 6; thence southeasterly along said line of Lot 6, 9 feet; thence southwesterly and parallel with Third Street, 132 feet to the point of beginning.

A part of Lots Six (6) and Seven (7) of Block Nine (9) of the City (formerly Town) of Chico, according to the official map thereof, filed in the office of the Recorder of the County of Butte, State of California, and more particularly described as follows:

Commencing at a point on the Easterly line of Main Street, distant Seventeen (17) feet, Southerly from the Northerly line of Lot Six (6) said Block; thence Easterly and parallel with Second Street, One Hundred and Thirty-two (132) feet; thence at a right angle Northerly and parallel with Main Street, Fifty (50) feet; thence at a right angle Westerly and parallel with Second Street, One Hundred Thirty-two (132) feet to the Easterly line of Main Street; thence Southwesterly along the Easterly line of Main Street, Fifty (50) feet to the place of beginning.

Witnesseth:

That whereas the said H. A. Goldman, Myrtle

Goldman, H. F. Baruh and Doris G. Baruh, contemplate leasing the above-described premises for a term of twenty-five (25) years or upwards to Montgomery Ward & Co., Incorporated, an Illinois Corporation, having general offices at 619 West Chicago Avenue, Chicago, Illinois, and

Whereas, the said Montgomery Ward & Co., Incorporated, expects to make extensive improvements upon the premises demised by said lease dated November 1, 1943, and desires to have uninterrupted possession of such premises for the full term of its lease and during any extension or extensions of the terms thereof, and

Whereas, the said Mildred Dunwoody, H. A. Goldman, Myrtle Goldman, H. F. Baruh and Doris G. Baruh are willing and agreeable to allow the said Montgomery Ward & Co., Incorporated, to have uninterrupted possession of the premises hereinabove described during the full term and any extension or extensions of the term of any lease of such premises which the said Montgomery Ward & Co., Incorporated, may enter into with the said H. A. Goldman, Myrtle Goldman, H. F. Baruh and Doris G. Baruh.

Now, Therefore, in consideration of the said Montgomery Ward & Co., Incorporated, entering into a lease for a term of twenty-five (25) years or upwards covering the premises hereinabove described with the said H. A. Goldman, Myrtle Goldman, H. F. Baruh and Doris G. Baruh, and for the further consideration of the sum of Ten Dollars ($10.00) and other good and valuable considerations

paid by the said Montgomery Ward & Co., Incorporated, to the said Mildred Dunwoody, the receipt and sufficiency of which is hereby acknowledged, the parties hereto agree as follows:

1. Effective as of the date of the complete execution and delivery of this agreement by the parties hereto, the following sections and paragraphs of said lease dated November 1, 1943, shall, upon the stipulation and conditions set forth in Section 2 hereof be of no force and effect whatsoever, to wit: Section 4, after the date the said Montgomery Ward & Co., Incorporated, is required to pay taxes under the provisions of any lease it enters into with the said H. A. Goldman, Myrtle Goldman, H. F. Baruh and Doris G. Baruh, covering the above-described premises; Sections 5 and 6, the paragraph attached to page 6, Sections 7, 8, 9, 11 and 12, the paragraph attached to page 9, Sections 13 and 14 and paragraph (a) under Section 14, the paragraph attached to page 10, Sections 15, 16 and 17, paragraphs (a) and (b) under Section 18 and Sections 20, 21, 22 and 26.

2. The parties hereto agree that if the said Montgomery Ward & Co., Incorporated, enters into a lease of the hereinabove-described premises with the said H. A. Goldman, Myrtle Goldman, H. F. Baruh and Doris G. Baruh for a term of twenty-five (25) years or upwards, within six (6) months after the date hereof, and that so long as any such lease shall not be terminated, all sections and paragraphs mentioned in Section 1 hereof shall be ineffective and unenforcible by any of the parties hereto.

3. It is agreed that all permanent additions or improvements placed upon the hereinabove-described premises by the said Montgomery Ward & Co., Incorporated, shall belong to the said Mildred Dunwoody, her heirs, legal representatives and assigns subject to said lease dated November 1, 1943, and to any lease of such premises which the said Montgomery Ward & Co., Incorporated, may enter into as aforesaid.

4. Except as modified hereby said lease dated November 1, 1943, shall remain in effect. All of the covenants of said lease as hereby amended shall be binding upon and shall inure to the benefit of the parties hereto, their respective heirs, legal representatives and assigns.

In Witness Whereof, the parties hereto have caused this agreement to be duly executed in duplicate, under seal, as of the day and year first above written.

[Seal] MILDRED DUNWOODY,
MILDRED DUNWOODY.

Witnesses:

JEAN FULTON,
DORIS BROOMHEAD,

[Seal] H. A. GOLDMAN,
H. A. GOLDMAN,

[Seal] MYRTLE GOLDMAN,
MYRTLE GOLDMAN,

[Seal] H. F. BARUH,
H. F. BARUH,

[Seal] DORIS G. BARUH,
DORIS G. BARUH.

Witnesses:

GRACE McGOLDRICK,
JANE ANDERSON,

L. C. DAVIS, JR.,
JOSEPH TAUSSIG,

State of California,
County of Butte—ss.

On this 29th day of April, A.D. 1946, before me, Jerome D. Peters, a Notary Public in and for said county and state, residing therein, duly commissioned and sworn, personally appeared Mildred Dunwoody, an unmarried person, known to me to be the person whose name is subscribed to the within instrument, and acknowledged to me that she executed the same.

In Witness Whereof, I have hereunto set my hand and affixed my official seal the day and year in this certificate first above written.

[Seal] JEROME D. PETERS,
Notary Public, Butte County,
California.

My commission expires: 4-16-47.

State of California,
County of Alameda—ss.

On this 16th day of April, A.D. 1946, before me, Mary Parkinson, a Notary Public in and for said county and state, residing therein, duly commissioned and sworn, personally appeared H. A. Goldman and Myrtle Goldman, his wife, and H. F. Baruh and Doris G. Baruh, his wife, known to me to be the persons whose names are subscribed to the within instrument, and acknowledged to me that they executed the same.

In Witness Whereof, I have hereunto set my hand and affixed my official seal the day and year in this certificate first above written.

[Seal] MARY PARKINSON,
Notary Public, Alameda
County, California.

My commission expires: Jan. 21, 1950.

EXHIBIT "B"

Agreement

This Agreement entered into this 23rd day of April, 1946, by and between Mildred Dunwoody, the Party of the First Part, and Harold Baruh, Harold Goldman, Their Heirs, Assigns, and Executors, being the Party of the Second Part.

The Party of the First Part does hereby agree to execute a supplemental agreement together with that certain lease by and between the Parties of the

Second Part and the Montgomery Ward Company of Chicago, Illinois.

It is understood and agreed by and between both parties that the signing of said supplemental agreement and lease does not in any way relieve the parties of the Second Part of any of the obligations and conditions undertaken by said party of the Second Part in the original lease by and between the Party of the First Part and the Grand Rapids Furniture Company, dated November 1st, 1943, which was later assigned to the Party of the Second Part by the Grand Rapids Furniture Company and Harry Polse and Reva Polse.

For and in consideration of the signing of the supplemental agreement, and the lease hereinabove mentioned, the Parties of the Second Part do hereby agree to increase the monthly rental as stipulated in the original lease Twenty-five Dollars ($25.00) per month during the life of said lease.

HAROLD GOLDMAN,

HAROLD BARUH,

MILDRED DUNWOODY.

State of California,
County of Butte—ss.

On this 29th day of April, in the year One Thousand Nine Hundred and Forty-six, before me, Jerome D. Peters, a Notary Public in and for the County of Butte, personally appeared Mildred Dunwoody, an unmarried woman, known to me to be the same person whose name is subscribed to the

within instrument, and she duly acknowledged that she executed the same.

In Witness Whereof, I have hereunto set my hand and affixed my Official Seal, at my office, in the County of Butte, the day and year in this certificate first above written.

[Seal] JEROME D. PETERS,
Notary Public in and for the County of Butte, State of California.

[Endorsed]: Filed November 30, 1950.

[Title of District Court and Cause.]

AMENDED ANSWER AND CROSS-COMPLAINT OF DEFENDANT AND CROSS-COMPLAINANT MILDRED A. DUNWOODY

Comes Now the defendant Mildred A. Dunwoody and amends her answer to plaintiff's complaint on file herein, and admits, denies and avers as follows:

I.

Admits the allegations contained in Paragraphs I, II, III, IV, VII and VIII.

II.

Admits the allegations of Paragraph V, and avers that said policy of insurance provides that

"Subrogation: If this company shall claim that the fire was caused by the act or neglect of

any person or corporation, this company shall on payment of the loss be subrogated to the extent of such payment to all right of recovery by the insured for the loss resulting therefrom and such right shall be assigned to this company by the insured on re-receiving such payment."

and further,

"Subrogation Waiver Clause: This insurance shall not be prejudiced by agreement made by the named insured releasing or waiving this company's right of subrogation against third parties responsible for the loss under the following circumstances only:

"(I) If made before loss has occurred, such agreement may run in favor of any third party,"

and does not confer upon said plaintiff any right of subrogation with respect to any contract entered into by the insured with any third party; and, as this defendant is informed and believes and therefore avers, said policy does not contain a depreciation insurance endorsement and the coverage of said policy does not include depreciation.

III.

Admits the allegations of Paragraph VI of said complaint, save to the following extent: That the allegation respecting Paragraph 12 of said lease constitutes but a portion of said paragraph and that said paragraph of said lease is as follows:

"Should the whole or any part of any building or buildings at any time standing on the

demised premises be partially or totally destroyed by fire after the commencement of the term hereof, the same shall be restored by the Tenant at its own expense without unnecessary delay. The Tenant covenants and agrees that it, the Tenant, shall at all times during the term hereof and at its own expense keep any and all buildings or improvements now upon or hereafter constructed or placed upon said premises, insured against loss or damage by fire in an amount equal to eighty (80) per cent of the full insurable value thereof above the foundation walls. All such policies of insurance shall be payable to the landlords and Tenant as their interest may appear, and shall be written by solvent fire insurance companies authorized to do business in the State of California. Such Policies of insurance shall be held by the Tenant, and the Landlords shall be furnished with the usual certificates from insurance companies showing the existence of such policies. In case of loss, the Tenant is hereby authorized to adjust the loss and execute the proofs thereof in the names of both the Tenant and the Landlords. So long as the Tenant shall comply with the provisions of this lease respecting fire insurance, the Landlords covenant and agree not to carry or permit to be carried during the term of any extension of renewal thereof, any additional or other fire insurance covering any interest in the demised premises without the

knowledge and consent of the Tenant, but if the Landlords shall desire to carry additional insurance and request the tenant to consent thereto, its consent shall not be unreasonably withheld when any such insurance shall not jeopardize or decrease the amount recoverable under the insurance or self insurance herein provided to be carried by the Tenant. The Tenant shall, upon the request of the Landlords furnish the Landlords evidence of its compliance with these provisions and of the fact of coverage adequate in the premises.

"Notwithstanding anything else herein contained to the contrary, if the premises or a portion thereof be damaged by fire, upon the payment of insurance by the insurance company of the loss to the parties hereto as their interests may appear, all of such payment may be used by the Landlord for the purpose of restoring the portion damaged if the Landlord desires,"

and further avers that this defendant Mildred A. Dunwoody sought and received the consent of the defendants, Harold A. Goldman, Myrtle Goldman, Harold F. Baruh and Doris G. Baruh, to carry insurance upon the said building or buildings; and that pursuant to said consent this defendant Mildred A. Dunwoody insured her interest as owner of said property with said plaintiff and which insurance was covered and evidenced by plaintiff's said policy No. 4-24777.

IV.

Admits the first sentence of Paragraph IX; denies the second sentence.

V.

Denies Paragraph X.

VI.

Answering Paragraph XI, answering defendant denies that there is any right of apportionment of the said loss between plaintiff and defendant Security Insurance Company, and denies that the sound value of said buildings was at the time of said loss only the sum of $33,533.98 and avers it was upwards of $50,000.00.

VII.

Alleges that answering defendant did, within the time provided for by the said policy issued to her by plaintiff, and in pursuance of plaintiff's request, render to plaintiff an amended proof of loss, signed and sworn to by her, setting forth therein the information called for by said policy and claimed a total loss in the sum of $10,000.00, which was accepted as adequate proof under the said policy by plaintiff; that neither the whole or any part of said sum of $10,000.00 has been paid.

Amended Cross-Complaint Against Plaintiff Hardware Mutual Insurance Company of Minnesota, a corporation.

Comes Now the defendant Mildred A. Dunwoody and cross-complains against plaintiff Hardware

Mutual Insurance Company of Minnesota, a corporation, and for cause of cross-complaint alleges as follows, to wit:

I.

Defendant and cross-complainant Mildred A. Dunwoody adopts the allegations contained in Paragraphs II, V and VIII of plaintiff's complaint and that portion of Paragraph IX which reads:

> "Defendant Mildred A. Dunwoody has made a demand upon plaintiff for the sum of $10,000.00, being the full amount of the policy of fire insurance issued by plaintiff to said defendant;"

denies the remaining portion of Paragraph IX.

II.

That the policy of insurance referred to in Paragraph V as having been issued to the defendant and cross-complainant was insurance upon her owner's interest in the property described in the policy, namely, the two buildings referred to in Paragraph V of plaintiff's complaint; that upon the 8th day of April, 1949, the said two buildings referred to in Paragraph V of plaintiff's complaint were completely destroyed by fire; that the value of said buildings was in excess of the amount of fire insurance carried against their loss, namely, $10,000.00.

III.

That defendant and cross-complainant has performed all the terms and conditions of the said policy of insurance referred to in Paragraph V of

plaintiff's complaint and the full amount thereof, namely, $10,000.00 is now due, owing and unpaid from plaintiff and cross-defendant to defendant and cross-complainant.

Wherefore, defendant and cross-complainant prays judgment as follows:

1. That plaintiff take nothing by its said complaint.

2. That cross-complainant Mildred A. Dunwoody have judgment under her cross-complaint against the plaintiff Hardware Mutual Insurance Company of Minnesota, a corporation, in the sum of $10,000.00, the face value of the said insurance policy, with interest at the rate of 7% per annum from January 21st, 1950, and for her costs of suit.

3. For such other relief as may be meet and proper in equity.

Dated: November . ., 1950.

/s/ PETERS AND PETERS,
Attorneys for Defendant and Cross-Complainant,
Mildred A. Dunwoody.

State of California,
County of Butte—ss.

Mildred A. Dunwoody, being first duly sworn, deposes and says:

That she is one of the defendants in the above-entitled action; that she has read the foregoing Amended Answer and Cross-Complaint of Defend-

ant and Cross-Complainant Mildred A. Dunwoody and knows the contents thereof; that the same is true of her own knowledge except as to those matters therein contained on her information or belief and as to those matters, she believes it to be true.

/s/ MILDRED A. DUNWOODY.

Subscribed and sworn to before me this .... day of November, 1950.

[Seal] /s/ JEROME D. PETERS, JR.,
Notary Public in and for the County of Butte, State of California.

Affidavit of Service by Mail attached.

[Endorsed]: Filed November 27, 1950.

[Title of District Court and Cause.]

ANSWER TO CROSS-COMPLAINT

For answer to the cross-complaint of Mildred A. Dunwoody, defendant and cross-complainant in the above-entitled cause, plaintiff and cross-defendant Hardware Mutual Insurance Co. of Minnesota admits, denies and alleges as follows:

I.

Plaintiff and cross-defendant denies each and every allegation in paragraph II of said cross-complaint.

Wherefore, plaintiff and cross-defendant prays

that defendant and cross-complainant Mildred A. Dunwoody take nothing by her cross-complaint herein, and that judgment be entered in favor of plaintiff and cross-defendant and against said defendant and cross-complainant and against the other defendants as prayed in plaintiff's complaint on file herein.

BERT W. LEVIT,

DAVID C. BOGERT,

LONG & LEVIT,

By /s/ DAVID C. BOGERT,

Attorneys for Plaintiff and Cross-Defendant.

Affidavit of Service by Mail attached.

[Endorsed]: Filed July 1, 1950.

District Court of the United States
Northern District of California
Southern Division

At a Stated Term of the Southern Division of the United States District Court for the Northern District of California, held at the Court Room thereof, in the City and County of San Francisco, on Tuesday, the 20th day of February, in the year of our Lord one thousand nine hundred and fifty-one.

Present: The Honorable Michael J. Roche,
District Judge.

[Title of Cause.]

MINUTE ORDER

This case came on regularly this day for trial before the Court sitting without a jury. David C. Bogert, Esq. appeared on behalf of plaintiff; Jerome D. Peters, Esq. was present for defendant Dunwoody, and Robert Sills, Esq. appeared on behalf of H. F. Baruh and wife and H. A. Goldman and wife. Upon motion of Mr. Bogert, it is Ordered that the answer to cross-complaint stand as answer to the amended cross-complaint of Mildred Dunwoody. Opening statements were made by respective counsel. The plaintiff introduced into evidence, filed in record, certain exhibits which were to be marked Plaintiff's Exhibits Nos. 1 and 2. Harold F. Baruh and Mildred Dunwoody were sworn and testified as adverse witnesses on behalf of plaintiff. Defendant introduced into evidence certain exhibits which were marked as Defendant's Exhibits "A" and

"B." After arguments by respective counsel, it is Ordered that judgment be and the same is hereby entered for the defendant and against the plaintiff. Further Ordered that findings of fact and conclusions of law and judgment be prepared and that the matter be continued to March 9, 1951, for settlement of findings.

[Title of District Court and Cause.]

STIPULATION TO ADMIT CERTAIN FACTS

The parties to the above-entitled action agree upon the following statement of a portion of the facts in the above-entitled action and submit the same to the Court as true.

I.

The jurisdiction of this Court arises out of the fact that the parties are citizens of different states and the amount in controversy is in excess of $3,000 exclusive of interest and costs. This is a suit brought pursuant to the Federal Declaratory Judgment Act (28 USC 400), in a case of actual controversy between plaintiff and defendants.

II.

The plaintiff is a corporation incorporated under the laws of the State of Minnesota. The plaintiff is now and for many years past continuously has been engaged in business as an insurance underwriter in and by authority of the several states of the United

States, including the State of California. The principal office of the plaintiff in the State of California is located in San Francisco.

III.

Each of the defendants is a resident and citizen of the State of California, and not a resident or citizen of the State of Minnesota.

IV.

On or about 24 September, 1948, plaintiff did, in California, issue and deliver to defendant Mildred A. Dunwoody its policy of insurance No. 4-24777 (Old California Standard Form Fire Insurance Policy) insuring said defendant against loss by fire for the term of 24 September, 1948, to 24 September, 1949, in the amount of $10,000. Said insurance was apportioned as follows: Item 1. $8,000 on one story composition roof brick building at 223-225 Main Street, Chico, California; and Item 4. $2,000 on the one story brick building with composition roof situated at 227-229 Main Street, Chico, California.

The main body of the policy contains a paragraph relating to subrogation reading as follows:

> "Subrogation. If this company shall claim that the fire was caused by the act or neglect of any person or corporation, this company shall, on payment of the loss be subrogated to the extent of such payment to all right of recovery by the insured for the loss resulting therefrom, and such right shall be assigned to this company by the insured on receiving such payment."

An endorsement attached to said policy contains a paragraph relating to waiver of subrogation reading, in part, as follows:

"19. Subrogation Waiver Clause: This insurance shall not be prejudiced by agreement made by the named Insured releasing or waiving this Company's right of subrogation against third parties responsible for the loss, under the following circumstances only:

(I) If made before loss has occurred, such agreement may run in favor of any third party; . . .

(III) Whether Made Before or After Loss Has Occurred, Such Agreement Must Include a Release or Waiver of the Entire Right of Recovery of the Named Insured Against Such Third Party."

A true and correct copy of said policy of insurance and of the endorsements attached thereto is attached hereto, marked Exhibit "A," and made a part hereof. Said policy was obtained by defendant Mildred A. Dunwoody with the consent of the other defendants. Said policy does not contain a depreciation insurance endorsement and the coverage of said policy does not include depreciation.

V.

At all times mentioned in this stipulation the premises at 223-229 Main Street, Chico, California, were and now are leased to defendants Harold A. Goldman, Myrtle Goldman, Harold F. Baruh, and Doris G. Baruh under a written lease for a term of

fifty years, commencing 1 January, 1944. Paragraph 12 of said lease reads as follows:

> "12. Should the whole or any part of any building or buildings at any time standing on the demised premises be partially or totally destroyed by fire after the commencement of the term hereof, the same shall be restored by the Tenant at its own expense without unnecessary delay. The Tenant covenants and agrees that it, the Tenant, shall at all times during the term hereof and at its own expense keep any and all buildings or improvements now upon or hereafter constructed or placed upon said premises, insured against loss or damage by fire in an amount equal to eighty (80) per cent of the full insurable value thereof above the foundation walls. All such policies of insurance shall be payable to the Landlords and Tenant as their interest may appear, and shall be written by solvent fire insurance companies authorized to do business in the State of California. Such Policies of insurance shall be held by the Tenant, and the Landlords shall be furnished with the usual certificates from insurance companies showing the existence of such policies. In case of loss, the Tenant is hereby authorized to adjust the loss and execute proofs thereof in the names of both the Tenant and the Landlords. So long as the Tenant shall comply with the provisions of this lease respecting fire insurance, the Landlords covenant and agree not to carry or permit to be carried during the term

of any extension of renewal thereof, any additional or other fire insurance covering any interest in the demised premises without the knowledge and consent of the Tenant, but if the Landlords shall desire to carry additional insurance and request the tenant to consent thereto, its consent shall not be unreasonably withheld when any such insurance shall not jeopardize or decrease the amount recoverable under the insurance or self insurance herein provided to be carried by the Tenant. The Tenant shall, upon the request of the Landlords furnish the Landlords evidence of its compliance with these provisions and of the fact of coverage adequate in the premises.

Notwithstanding anything else herein contained to the contrary, if the premises or a portion thereof be damaged by fire, upon the payment of the insurance by the insurance company of the loss to the parties hereto as their interests may appear, all of such payment may be used by the Landlord for the purpose of restoring the portion damaged if the Landlord desires."

VI.

The property described in said policy of insurance was totally destroyed by fire on 8 April, 1949. Said fire was due to causes unknown.

VII.

At the time of said fire there was in full force and effect another policy of fire insurance No.

64539 issued by the Security Insurance Company of New Haven, covering the buildings at 223-225 Main Street, Chico, California, and 227-229 Main Street, Chico, California, in the amount of $36,795.00. The insured named in said policy were the defendants Harold F. Baruh and Harold Goldman and/or M. Dunwoody. Loss under said policy was to be adjusted with and payable to said Harold F. Baruh and Harold Goldman. Said policy contained a depreciation insurance endorsement and thereby insured the replacement cost of said buildings without deduction for depreciation.

VIII.

Defendant Mildred A. Dunwoody has made a demand upon the plaintiff for the sum of $10,000, being the full amount of the policy of fire insurance issued by plaintiff to said defendant.

IX.

The construction of a building or buildings in replacement of the said buildings destroyed by said fire has not been undertaken as yet. Said construction has been delayed by the defendants Harold A. Goldman, Mytrle Goldman, Harold F. Baruh, and Doris G. Baruh with the consent and approval of the defendant Mildred A. Dunwoody. Said consent was given after the said fire and in or about the month of June, 1950.

X.

The parties hereto have not agreed as to the sound value at the time of the fire of the buildings described in said policies of insurance.

XI.

The defendant Mildred A. Dunwoody, as Landlord, and defendants Harold A. Goldman, Myrtle Goldman, Harold F. Baruh, and Doris G. Baruh, as Tenant, entered into a certain supplemental agreement, a true copy of which is attached hereto, marked Exhibit "B" and made a part hereof.

XII.

The defendant Mildred A. Dunwoody, as Party of the First Part, and Harold Baruh and Harold Goldman, Parties of the Second Part, entered into a certain supplemental agreement, a true copy of which is attached hereto, marked Exhibit "C" and made a part hereof.

XIII.

Within six months after the date and the execution and delivery of the agreement referred to hereinabove in paragraph XI, Montgomery Ward & Co., Incorporated, as Tenant, entered into a sublease with the defendants Harold A. Goldman, Myrtle Goldman, Harold F. Baruh, and Doris G. Baruh, as Landlord, of the premises referred to hereinabove in Paragraph V for a term in excess of twenty-five years, commencing 1 March, 1946. Notarial certifications attached thereto indicate that defendant Mildred A. Dunwoody acknowledged her signature before a notary public on 29 April, 1946, that the other defendants acknowledged their signatures before a notary public on 16 April, 1946, and that officers of Montgomery Ward & Co., Incorporated

acknowledged their signatures before a notary public on 28 June, 1946.

XIV.

The buildings destroyed by said fire were the same buildings described in and leased by defendant Mildred A. Dunwoody to the defendants Harold A. Goldman, Myrtle Goldman, Harold F. Baruh, and Doris G. Baruh under the terms of the lease referred to hereinabove in paragraph V.

The parties hereto reserve the right to offer any further legal evidence to the Court upon the trial of this action as to all facts not hereinbefore expressly agreed upon.

Dated this 31st day of December, 1950.

BERT W. LEVIT,
DAVID C. BOGERT,
LONG & LEVIT,
By /s/ DAVID C. BOGERT,
Attorneys for Plaintiff.

OSCAR SAMUELS and
TEVIS JACOBS,
By /s/ OSCAR SAMUELS,
Attorneys for Defendants Harold A. Goldman, Myrtle Goldman, Harold F. Baruh and Doris G. Baruh.

PETERS AND PETERS,
By /s/ JEROME D. PETERS,
Attorneys for Defendant and Cross-Complainant Mildred A. Dunwoody.

THIS POLICY IS ISSUED BY A MUTUAL COMPANY HAVING SPECIAL REGULATIONS LAWFULLY APPLICABLE TO ITS ORGANIZATION, MEMBERSHIP, POLICIES OR CONTRACTS OF INSURANCE OF WHICH THE FOLLOWING SHALL APPLY TO AND FORM A PART OF THIS POLICY. THE INSURED SHALL NOT BE SUBJECT TO CONTINGENT OR ASSESSMENT LIABILITY UNDER THIS POLICY.

EXCERPTS FROM THE ARTICLES OF INCORPORATION AND BY LAWS

THE ANNUAL MEETING OF MEMBERS OF THIS CORPORATION SHALL BE HELD IN THE HOME OFFICE OF THE CORPORATION ON THE THIRD THURSDAY IN APRIL OF EACH YEAR AT NINE O'CLOCK A. M. AT EVERY MEETING OF THE MEMBERS, ANNUAL OR SPECIAL, EACH MEMBER PRESENT IN PERSON OR BY PROXY SHALL BE ENTITLED TO ONE VOTE FOR EACH POLICY HE HOLDS. NO POLICY ISSUED BY THE CORPORATION SHALL BE SUBJECT TO ASSESSMENT OR TO ANY CONTINGENT MUTUAL LIABILITY WHATSOEVER UNLESS THE FACT THAT IT IS SUBJECT TO SUCH LIABILITY AND THE MAXIMUM EXTENT THEREOF IS PLAINLY STATED IN THE POLICY. THE BOARD OF DIRECTORS MAY FROM TIME TO TIME DIVIDE THE POLICIES WRITTEN BY THE CORPORATION INTO DIFFERENT CLASSES IN ACCORDANCE WITH SUCH BASIS OF CLASSIFICATION AS THE BOARD SHALL DEEM JUST AND PROPER. THE BOARD SHALL FROM TIME TO TIME DETERMINE WHEN, AND IN WHAT AMOUNTS, AND ON WHICH CLASS OR POLICIES, DIVIDENDS SHALL BE DISTRIBUTED TO THE HOLDERS OF SUCH POLICIES FROM THE SURPLUS OF THE CORPORATION.

California Standard Form Fire Insurance Policy

Expires SEPTEMBER 24, 1949

Property BUILDING

Amount . . . . . . $ 10,000.00

Fire Premium . . $ 98.00 | Total Premium

Ext. Cov. Premium $ 11.20 | $ 109.20

Insured MILDRED A. DUNWOODY

No. 4-24777

HARDWARE MUTUAL INSURANCE COMPANY OF MINNESOTA

INCORPORATED 1899

HOME

MINNEAPOLIS, MINN.

SPECIMEN COPY

IMPORTANT

For service communicate with our office at

417 Montgomery Street
San Francisco 4, California

The insured named herein is hereby notified that while this policy is in force he is by virtue thereof a member of the Hardware Mutual Insurance Company of Minnesota, and that the annual meeting of said company is held at its Home Office in Minneapolis on the third Thursday in April of each year at 9 o'clock A. M.

It is important that the written portions of all policies covering the same property read exactly alike. If they do not they should be made uniform at once.

READ THIS POLICY.

Ins. Co. is liable only for actual cash value.

Policy is void in case of any fraud, false swearing, misrepresentation or concealment about material facts.

Policy is void, unless otherwise agreed in writing, if
1st. It is assigned before loss;
2nd. Insured has or shall procure other insurance;
3rd. Any change occurs in location of property,
4th. Insured building is on ground not owned in fee simple by insured;
5th. Insured is not sole and unconditional owner.

Policy is suspended, unless otherwise agreed in writing, if
6th. Described building becomes vacant or unoccupied for 10 days;
7th. Mechanics are employed more than 15 days in repairing same
8th. Property is or becomes encumbered by chattel mortgage.
9th. Illuminating gas or vapor is generated in or adjacent to described building;
10th. Explosives or prohibited quantities of gasoline, etc., are kept on premises.

Insurance ceases if described building or any material part falls except as result of fire.

Policy does not cover certain enumerated personal property.

Note particularly duty of insured in case of loss;

Also provisions avoiding or suspending policy, including changes of ownership or possession.

(4)

California Standard Form Fire Insurance Policy

No. 4-24777

SPECIMEN COPY

OTHER INSURANCE PERMITTED EXCEPT BY AGREEMENT ENDORSED HEREON OR ADDED HERETO

MUTUAL COMPANY
PARTICIPATING
NON ASSESSABLE POLICY

HARDWARE MUTUAL INSURANCE COMPANY OF MINNESOTA

HOME OFFICE — MINNEAPOLIS, MINN.

PACIFIC DEPARTMENT — SAN FRANCISCO, CALIFORNIA

Amount $10,000.00 Rate 1. - .7 Premium $ Total Premium

Extended Coverage* Rate .11 Premium $ 11. $ 1

*No insurance attaches in connection with Extended Coverage Perils unless "Rate" and "Premium" is specified above and Extended Coverage endorsement is attached to this policy.

In Consideration of the Stipulations herein named and of DOLLARS PREMIUM

Does Insure MILDRED A. DUNWOODY

for the term of ONE YEAR

from the TWENTY FOURTH day of SEPTEMBER 19 48, at noon,

to the TWENTY FOURTH day of SEPTEMBER 19 49 at noon

against all loss or damage by fire, except as hereinafter provided. To an amount not exceeding TEN THOUSAND AND 00/100 Dollars

to the following described property while located and contained as described herein, and not elsewhere, to-wit:

The company will not be liable beyond the actual cash value of the interest of the insured in the property at the time of loss [illegible] what it would then cost the insured to repair or replace the same with material of like kind and quality [illegible] estimated without allowance for any increased cost of repair or reconstruction by reason of any ordinance or law regulating repair or reconstruction of buildings, and without compensation for loss resulting from interruption of business [illegible]

[illegible]

SPECIMEN COPY

HARDWARE MUTUAL INSURANCE COMPANY OF MINNESOTA

Agent

S[illegible] CON[illegible] SPECIALLY REFERRED TO

Property not covered. This company shall not be liable for loss to accounts, bills, currency, evidences of debt or ownership or other documents, money, notes or securities; nor, (b) unless liability is specifically assumed hereon, for loss to bullion, casts, curiosities, drawings, dies, jewels, manuscripts, medals, models, patterns, pictures, scientific apparatus, business or store or office furniture or fixtures, sculptures, frescoes, decorations, or property held on storage or for repair.

Hazards not covered. This company will not be liable for loss by (a) theft; or (b) by neglect of the insured to use all reasonable means to save and preserve the property at and after a fire, or when the property is endangered by fire; or (c) (unless fire ensues, and in that event for the damage by fire only) by explosion of any kind or lightning; or (d) by invasion, insurrection, riot, civil war, or commotion, or (except as hereinafter provided) by military or usurped power, or order of any civil authority, but the company will be liable (unless otherwise provided by endorsement hereon or added hereto) if the property is lost or damaged, by fire or otherwise, by civil authority or military or usurped power exercised to prevent the spread of fire not originating from a cause excepted hereunder and which fire otherwise probably would have caused the loss of or damage to the insured property.

Matters avoiding policy. This entire policy shall be void, (a) if the insured has concealed or misrepresented any material fact or circumstances concerning this insurance or the subject thereof; or, (b) in case of any fraud or false swearing by the insured touching any matter relating to this insurance or the subject thereof, whether before or after a loss.

Unless otherwise provided by agreement endorsed hereon or added hereto, this entire policy shall be void, (a) if the insured now has or shall procure any other insurance, whether valid or not, on property covered in whole or in part by this policy, or (b) if the interest of the insured be other than unconditional and sole ownership, or (c) if the subject of insurance be a building on ground not owned by the insured in fee simple, or (d) if with the knowledge of the insured foreclosure proceedings be commenced or notice given of sale of any property covered by this policy by virtue of any mortgage or trust deed, or (e) if this policy be assigned before a loss.

Matters suspending insurance. Unless otherwise provided by agreement endorsed hereon or added hereto this company shall not be liable for loss or damage occurring (a) while the hazard be materially increased by any means within the control of the insured; or (b) if the subject of insurance be a manufacturing establishment, while it is operated in whole or in part at night later than ten o'clock or while it ceases to be operated beyond the period of ten consecutive days; or (c) while mechanics or artisans are employed in building or altering or repairing the described premises for more than fifteen days at any one time; or (d) while illuminating gas or vapor be generated in the described building (or adjacent thereto) for use therein; or (e) while there be kept, used or allowed on the described premises (any usage or custom of trade or manufacture to the contrary notwithstanding) calcium carbide, phosphorus, dynamite, nitroglycerine, fireworks or other explosives; or exceeding one quart each of benzine, gasoline, naphtha, or ether; or more than twenty-five pounds of gunpowder; or (f) while a building herein described whether intended for occupation by owner or tenant is vacant or unoccupied beyond the period of ten (10) consecutive days; (g) while the interest in, title to or possession of the subject of insurance is changed excepting:—(1) by the death of the insured; (2) a change of occupancy of building without material increase of hazard; and (3) transfer by one or more several copartners or coöwners to the others.

Such suspension shall not extend the term of this policy nor create any right for refund of the whole or any portion of premium, nor affect the respective rights of cancellation.

Chattel mortgage. Unless otherwise provided by agreement in writing endorsed hereon or added hereto this company shall not be liable for loss or damage to any property insured hereunder while encumbered by a chattel mortgage, but the liability of the company upon other property hereby insured shall not be affected by such chattel mortgage.

Fallen building clause. Unless otherwise provided by agreement endorsed hereon or added hereto, if a building or any material part thereof fall, except as the result of fire, all insurance by this policy on such building or its contents shall immediately cease.

Removal when endangered by fire. Should any of said property be necessarily removed because of danger from fire, and there is no other insurance thereon, that part of this policy in excess of the value of the insured property remaining in the original location, or, if there is other insurance thereon, that part of this policy in excess of its proportion of the value of the insured property remaining in the original location, shall, for the ensuing five days only, cover said removed property in its new location or locations.

Cancellation. This policy shall be cancelled at any time at the request of the insured, in which case the company shall, upon surrender of this policy, refund the excess of paid premium above the customary short rates for the expired time. This policy may be cancelled at any time, without tender of unearned portion of premium, by the company by giving five (5) days' written notice of cancellation to the insured and to any mortgagee or other party to whom, with the written consent of the company, this policy is made payable, in which case the company shall, upon surrender of the policy or relinquishment of liability thereunder, refund the excess of paid premium above the pro rata premium for the expired time.

Duty of insured in case of loss. When a loss occurs the insured must give to this company written notice thereof without unnecessary delay; and shall protect the property from further damage; forthwith separate the damaged and undamaged personal property and put it in the best possible order; and without unnecessary delay make a complete inventory stating as far as possible the quantity and cost of each article, and the amount claimed thereon.

Within sixty days after the commencement of the fire the insured shall render to the company at its main office in California named herein preliminary proof of loss consisting of a written statement signed and sworn to by him setting forth:— (a) his knowledge and belief as to the origin of the fire; (b) the interest of the insured and of all others in the property; (c) the cash value of the different articles or properties and the amount of loss thereon; (d) all incumbrances thereon; (e) all other insurance, whether valid or not, covering any of said articles or properties; (f) a copy of the descriptions and schedules in all other policies unless similar to this policy, and in that event, a statement as to the amounts for which the different articles or properties are insured in each of the other policies; (g) any changes of title, use, occupation, location or possession of said property since the issuance of this policy, (h) by whom and for what purpose any building herein described, and the several parts thereof, were occupied at the time of the fire.

If the company claims that the preliminary proof of loss is defective and within five days after the receipt thereof (without admitting the amount of loss or any part thereof) notifies in writing the insured, or the party making such proof of loss, of the alleged defects (specifically stating them) and requests that they be remedied by verified amendments the insured or such party within ten days after the receipt of such notification and request must comply therewith or, if unable so to do, present to the company an affidavit to that effect

The insured shall also furnish, if required, as far as it is practicable to obtain the same, verified plans and specifications of any buildings, fixtures or machinery destroyed or damaged; and the insured shall exhibit to any person designated in writing by this company all that remains of any property herein described and shall submit to examination under oath, as often as required, by any such person, and subscribe to the testimony so given and shall produce to such person for examination all books of account, bills, invoices and other vouchers, and permit extracts and copies thereof to be made, and in case the originals are lost certified copies, if obtainable, shall be produced.

Ascertainment of amount of loss. This company shall be deemed to have assented to the amount of the loss claimed by the insured in his preliminary proof of loss, unless within twenty days after the receipt thereof, or, if verified amendments have been requested, within twenty days after their receipt, or within twenty days after the receipt of an affidavit that the insured is unable to furnish such amendments, the company shall notify the insured in writing of its partial or total disagreement with the amount of loss claimed by him and shall also notify him in writing of the amount of loss, if any, the company admits on each of the different articles or properties set forth in the preliminary proof or amendments thereto.

If the insured and this company fail to agree, in whole or in part, as to the amount of loss within ten days after such notification, this company shall forthwith demand in writing an appraisement of the loss or part of loss as to which there is a disagreement and shall name a competent and disinterested appraiser, and the insured within five days after receipt of such demand and name, shall appoint a competent and disinterested appraiser and notify the company thereof in writing, and the two so chosen shall before commencing the appraisement, select a competent and disinterested umpire.

The appraisers together shall estimate and appraise the loss or part of loss as to which there is a disagreement, stating separately the sound value and damage, and if they fail to agree they shall submit their differences to the umpire, and the award in writing duly verified of any two shall determine the amount or amounts of such loss.

The parties to the appraisement shall pay the appraisers respectively appointed by them and shall bear equally the expense of the appraisement and the charges of the umpire.

If for any reason not attributable to the insured, or to the appraiser appointed by him, an appraisement is not had and completed within ninety days after said preliminary proof of loss is received by this company, the insured is not to be prejudiced by the failure to make an appraisement, and may prove the amount of his loss in an action brought without such appraisement.

Options of company in case of loss. This company may, at its option, take all or any part of the property for which insurance hereunder is claimed at its ascertained or appraised value, and may also, at its option, in satisfaction of its liability hereunder, repair, rebuild or replace any building or structure or machine or machinery used therein, with other of like kind and quality, within a reasonable time, upon giving notice within twenty days of its intention so to do after the receipt by it of the preliminary proof of loss, or, if verified amendments have been requested, within twenty days after their receipt, or, within twenty days after the receipt of an affidavit that the insured is unable to furnish such amendments.

There can be no abandonment to this company of any property.

Apportionment of loss. This company shall not be liable under this policy for a greater proportion of any loss on the described property, or for loss by, and expenses of, removal from the premises endangered by fire, than the amount hereby insured bears to the entire insurance covering such property whether valid or not, or by solvent or insolvent insurers.

Loss when payable. A loss hereunder shall be payable in thirty days after the amount thereof has been ascertained either by agreement or by appraisement; but if such ascertainment is not had or made within sixty days after the receipt by the company of the preliminary proof of loss, then the loss shall be payable in ninety days after such receipt.

Non-waiver by appraisal or examination. This company shall not be held to have waived any provision or condition of this policy or any forfeiture thereof, by assenting to the amount of the loss or damage or by any requirement, act, or proceeding on its part relating to the appraisal or to any examination herein provided for.

Subrogation. If this company shall claim that the fire was caused by the act or neglect of any person or corporation, this company shall, on payment of the loss be subrogated to the extent of such payment to all right of recovery by the insured for the loss resulting therefrom, and such right shall be assigned to this company by the insured on receiving such payment.

Time for commencement of action. No suit or action on this policy for the recovery of any claim shall be sustained, until after full compliance by the insured with all of the foregoing requirements, nor unless begun within fifteen months next after the commencement of the fire.

Definitions. Wherever in this policy the word "insured" occurs, it shall be held to include the legal representatives of the insured in case of his death, and wherever the word "loss" occurs, it shall be deemed the equivalent of "loss or damage," and wherever the words "the time of loss or damage" are used they shall be deemed the equivalent of "the time of the commencement of the fire."

This policy, subject to all its stipulations and conditions, is hereby extended to cover loss by fire only in the same manner and to the same extent as though the words "not" and "or commotion" were not in line 39 of the printed conditions of the policy.

ASSIGNMENT OF INTEREST BY INSURED

The interest of _______________ as owner of the property covered by this Policy is hereby assigned to _______________ subject to the consent of _______________

(Name of Company)

Dated _______________

(Signature of Insured)

CONSENT BY COMPANY TO ASSIGNMENT OF INTEREST

_______________ (Name of Company), hereby consents that the interest of _______________ as owner of the property covered by this Policy be assigned to _______________

Dated _______________ Agent

Building, Equipment and Stock Form

Attached to and forming part of Policy No. 4-24777 of the Hardware Mutual Insurance Co. of Minnesota.

Issued to Mildred A. Dunwoody.

Agency at San Francisco, California.

Dated September 24, 1948.

This policy covers the following described property, all situated 223-225 Main Street (Page 19, Line 19).

Town of Chico, State of California.

*Item 1. $8,000.00 on the one story composition roof brick building while occupied as florist and auto parts store.

*Item 2. 1.03F—.112EC on equipment, pertaining to Insured's occupancy as all only while contained in, on or attached to the above described building.

*Item 3. $..... on stock, consisting principally of all only while contained in, on or attached to the above described building.

*Item 4. $2,000.00 on the one story brick building with composition roof while situated at 227-229 Main Street, Chico, California (Page 19, Line 24).

*Item 5. .78F—.112EC on

*6. Insurance Attaches Hereunder Only to Those Items for Which an Amount Is Shown in the Space Provided Therefor and Not Exceeding Said Amount Under Such Item(s). For Definition of Terms "Building," "Equipment," "Stock," See Paragraph 7 Below; for Extensions and Exclusions See Paragraphs Nos. 8 and 10 Below.

7. Definition of Terms:

(I) Building: Building or structure in its entirety, including all fixtures and machinery used for the service of the building itself, provided such fixtures and machinery are contained in or attached to and constitute a part of the building; additions in contact therewith; frescoes and all other decorations, permanently affixed to and constituting a part thereof; platforms, chutes, conveyors, bridges, trestles, canopies, gangways, and similar exterior structures attached thereto and located on the above described premises, provided, that if the same connect with any other building or structure owned by the named Insured, then this insurance shall cover only such portion of the same situate on the above-described premises as lies between the building covered under this policy and a point midway between it and such other building or structure; also (a) awnings, signs, door and window shades and screens, storm doors and storm windows; (b) cleaning and fire fighting apparatus; (c) janitors' supplies, tools and implements; (d) materials and supplies intended for use in construction, alterations or repairs of the building. Provided, however, that property described in (a), (b), (c) and (d) immediately above must be, at the time of any loss, (1) the property of the named Insured who is the owner of the building; and (2) used for the maintenance or service of the building; and (3) contained in or attached to the building; and (4) not specifically covered under an item other than the "Building" item of this or any other policy.

(II) Equipment: Equipment and personal property of every description, including property on which liability is required to be specifically assumed by the standard policy conditions, and, provided the described building is not owned by the named Insured, "Tenant's Improvements and Betterments" installed or paid for by the named Insured; but Excluding, (1) Bullion, Manuscripts, and Machine Shop or Foundry Patterns, (2) Property (Whether Covered Under This Policy or Not) Included Within the Description or Definition of "Stock," (3) Property Kept for Sale, and (4) Property Covered Under the "Building" Item of This or Any Other Policy.

(III) Stock: Stock of goods, wares and merchandise of every description, manufactured, unmanufactured, or in process of manufacture; materials and supplies which enter into the manufacture, packing, handling, shipping and sale of same; advertising material; all being the property of the named Insured, or sold but not removed (it being understood that the actual cash value of stock sold but not removed shall be the Insured's selling price); and the Insured's interest in materials, labor and charges furnished, performed on or incurred in connection with the property of others.

8. Extension Clause: Personal property of the kind and nature covered under any item hereof shall be covered under the respective item (a) while in, on, or under sidewalks, streets, platforms, alleyways or open spaces, provided such property is located

within 50 feet of the described "Building," and (b) while in or on cars and vehicles within 300 feet of the described "Building," and (c) while in or on barges and scows or other vessels within 100 feet of the described premises; provided such property is not covered by marine, inland marine or transportation insurance of any kind.

9. Trust and Commission Clause: To the extent that the named Insured shall be liable by law for loss thereto or shall prior to loss have specifically assumed liability therefor, any item of this policy covering on personal property shall also cover property of the kind and nature described in such item, at the location(s) herein indicated, held in trust, or on consignment or commission, or on joint account with others, or left for storage or repairs.

10. Exclusion Clause: In Addition to Property Expressly Excluded From Coverage by Any Provision of This Form or Other Endorsement Attached To This Policy, the Following Are Not Covered Under Any Item of This Policy and Are To Be Excluded In the Application of Any "Average Clause" or "Distribution Clause": Land Values, Gardens, Trees, Lawns, Plants, Shrubbery, Accounts, Bills, Currency, Evidences of Debt or Ownership or Other Documents, Money, and Notes or Securities, Aircraft, Boats, Motor Vehicles.

11. Loss, if any, under each item of this policy shall be adjusted with and payable to the Insured specifically named herein unless otherwise agreed in writing by this Company.

12. Loss, if any under item(s) ..... subject to all the terms and conditions of this policy, and to the written agreement, if any, between this Insurer and the following named Payee, is payable to..... .....whose mailing address is.....

13. Average Clause (This Clause Void Unless Percentage Is Inserted): In Event of Loss to Property Described In Any Item of This Policy as to Which Item a Percentage Figure Is Inserted In This Clause, This Company Shall Be Liable for No Greater Proportion of Such Loss Than the Amount of Insurance Specified In Such Item Bears To the Following Percentage of the Actual Value of the Property Described In Such Item at the Time of Loss, nor for More Than the Proportion Which the Amount of Insurance Specified In Such Item Bears to the Total Insurance on the Property Described In Such Item at the Time of Loss: Seventy Per Cent (70%) Applying to Item No. 1 and 4; ..... Per Cent (..%) Applying to Item No. ....; .... Per Cent (..%) Applying to Item No. ——.

If this policy be divided into two or more items, the foregoing conditions shall apply to each item separately.

14. Waiver of Inventory and Appraisement Clause: If any item of this policy is subject to the conditions of the Average Clause (Paragraph 13 above), it is also provided that when an aggregate claim for any loss to the property described in any such item of this policy is both less than Five Thousand Dollars ($5,000.00) and less than two per cent

(2%) of the total amount of insurance upon the property described in such item at the time such loss occurs, it shall not be necessary for the Insured to make a special inventory or appraisement of the undamaged property. But Nothing Herein Contained Shall Operate to Waive the Application of the Average Clause to Any Such Loss.

If this policy be divided into two or more items, the foregoing conditions shall apply to each item separately.

15. Excess Insurance Limitation Clause: No Item of This Policy Shall Attach to or Become Insurance Upon Any Property, Included Within the Description of Such Item, Which at the Time of Any Loss.

(a) Is More Specifically Described and Covered Under Another Item of This Policy, or Under Any Other Policy Carried By or In the Name of the Insured Named Herein, or

(b) Being the Property of Others Is Covered By Insurance Carried By or In the Name of Others Than the Insured Named Herein.

Until the Liability of Insurance Described Under (a) or (b) Has First Been Exhausted, and shall Then Cover Only the Excess of Value of Such Property Over and Above the Amount Payable Under Such Other Insurance, Whether Collectible or Not. This Clause Shall Not Be Applicable to Property of Others for the Loss of Which the Insured Named Herein Is Liable By Law or Has Prior To Any Loss Specifically Assumed Liability.

The Provisions Printed on the Back of This Form are Hereby Referred To and Made a Part Hereof.

V. J. MALONE,
Agent.

Provisions Referred To In and Made Part of This Form (No. 78-C)

16. Tenant's Improvements and Betterments Clause: "Tenant's Improvements and Betterments" (subject to the provisions of the paragraph hereof entitled "Equipment") are covered as property of the named Insured under the "Equipment" item of this policy, regardless of whether or not the same have or will become a permanent or integral part of the building(s) or the property of the building owner or lessor. The amount of loss on such "Tenant's Improvements and Betterments" shall be determined on the basis of the actual cash value thereof at the time of loss, irrespective of any limitation upon the interest of the Insured therein resulting from any lease or rental agreement affecting the same. The insurance on such "Tenant's Improvements and Betterments" shall not be prejudiced, nor shall the amount recoverable for loss thereon be diminished, because of insurance covering on the same issued in the name of the owner of said building(s) or of others than the Insured named in this policy. This Policy, However, Shall not Contribute to the Payment of Any Loss to "Tenant's Improvements and Betterments" Covered Under Any Policy or Policies Issued In the Name of the

Owner of Said Building(s) or of Others Than the Insured Named In This Policy.

17. Consequential Damage Assumption Clause: (To apply only if stock of merchandise, provisions or supplies in cold storage, which stock is subject to damage through change of temperature, are covered hereunder.) This Company (Subject to the Terms of This Policy) Shall Be Liable for Consequential Loss or Damage to Stock of Merchandise, Provisions and Supplies In Cold Storage Covered Hereunder Caused by Change of Temperature Resulting From Total or Partial Destruction by Any Peril Insured Against In This Policy, of Refrigerating or Cooling Apparatus, Connections or Supply Pipes Thereof, Unless Such Loss Is Specifically Excluded as to Any Such Peril by Express Provision of Any Form, Rider or Endorsement Attached to This Policy.

The Total Liability for Loss or Damage Caused by Any Peril Insured Against in This Policy and by Such Consequential Loss or Damage, Either Separately or Together, Shall In No Case Exceed the Total Amount of This Policy In Effect at the Time of Loss, If There Is Other Insurance Upon the Property Damaged Covering the Perils, or Any Thereof, Which Are Insured Against in This Policy, This Company Shall Be Liable Only for Such Proportion of Any Consequential Loss or Damage as the Amount Hereby Insured Bears To the Whole Amount of Insurance Thereon Whether Such Other Insurance Covers Against Consequential Loss or Damage or Not.

If the Building or Any Material Part Thereof Fall, Except as a Result of Fire, All Insurance by This Policy Shall Immediately Cease Provided That There Be No Fallen Building Clause Waiver Made a Part of This Policy.

18. Breach of Warranty Clause: If a breach of any warranty or condition contained in any rider attached to or made a part of this policy shall occur, which breach by the terms of such warranty or condition shall operate to suspend or avoid this insurance, it is agreed that such suspension or avoidance due to such breach, shall be effective only during the continuance of such breach and then only as to the building, fire division, contents therein, or other separate location to which such warranty or condition has reference and in respect of which such breach occurs.

19. Subrogation Waiver Clause: This insurance shall not be prejudiced by agreement made by the named Insured releasing or waiving this Company's right of subrogation against third parties responsible for the loss, under the following circumstances only:

(I) If made before loss has occurred, such agreement may run in favor of any third party;

(II) If Made After Loss Has Occurred, Such Agreement May Run Only in Favor of a Third Party Falling Within One of the Following Categories at the Time of Loss:

(a) Third Party Insured Under This Policy; or

(b) A Corporation, Firm, or Entity (1) Owned or Controlled by the Named Insured or in Which the Named insured Owns Capital Stock or Other Proprietary Interest, or (2) Owning or Controlling the Named Insured or Owning or Controlling Capital Stock or Other Proprietary Interest in the Named Insured:

(III) Whether Made Before or After Loss Has Occurred, Such Agreement Must Include a Release or Waiver of the Entire Right of Recovery of the Named Insured Against Such Third Party.

20. Automatic Reinstatement Clauses: (a) Applying to Losses not Exceeding One Hundred Dollars ($100.00) Under This Policy: The amount of insurance hereunder involved in a loss payment of not More Than One Hundred Dollars ($100.00) for This Policy shall be automatically reinstated.

(b) Applying to Losses in Excess of One Hundred Dollars ($100.00) Under This Policy: In the event of any loss payment under this policy in excess of One Hundred Dollars ($100.00) the amount paid shall be deemed reinstated and this policy automatically reinstated to the full amount in force immediately preceding said loss, Provided That the Policy Shall be Endorsed to That Effect Within 30 Days After the Payment of Loss, and the Insured Shall Pay to the Company the Pro Rata Premium for the Unexpired Time From the Date of Said Loss to the Expiration of This Policy, at the Rate in Force at the Time of Said Reinstatement. This clause shall apply to each loss separately.

21. Loss by Fire Resulting From "Riot" and "or Commotion" Clause: This policy, subject to all its stipulations and conditions, is hereby extended to cover loss by fire only in the same manner and to the same extent as though the words "riot" and "or commotion" were not in line 39 of the printed conditions of the policy.

22. Vacancy—Unoccupancy—Cessation of Operations Clause: Unless otherwise specified by endorsement added hereto: (a) If the subject of this insurance be a manufacturing, mill, or mining plant, permission is granted to remain vacant or unoccupied or to shut down and cease operations, for a period of not to exceed sixty (60) consecutive days at any one time; or (b) If the subject of insurance be a cannery, fruit, nut or vegetable packing or processing plant, fish reduction plant, hop kiln, rice drier, beet sugar factory, cotton gin, cotton compress or cotton seed oil mill, permission is granted to remain vacant or unoccupied for a period of not to exceed sixty (60) consecutive days at any one time, or to shut down and cease operations (but not to be vacant) for a period of not to exceed ten (10) months at any one time; (c) Except as otherwise provided in (a) and (b) immediately above, permission is granted to remain vacant or unoccupied without limit of time. Nothing herein contained shall be construed to abrogate or modify any provision or warranty of this policy requiring (1) the maintenance of watchman service; (2) the maintenance of all fire extinguishing appliances and apparatus including sprinkler system, and water

supply therefor, and fire detecting systems, in complete working order; nor to extend the term of this policy.

23. Permits and Agreements Clause: Permission granted: (a) For other insurance; (b) For such use of the premises as is usual or incidental to the business conducted therein and for existing and increased hazards and for change in use or occupancy except as to any specific hazard, use, or occupancy prohibited by the express terms of this policy or by any endorsement thereto; (c) To generate and use illuminating gas or vapor; (d) To keep and use all articles and materials usual and incidental to said business, in such quantities as the exigencies of the business require; (e) To work and operate at any and all times but without extending the term of this policy; (f) For the building(s) to be in course of construction, alteration or repair, all without limit of time but without extending the term of this policy, and to build additions thereto, and this policy under its respective item(s) shall cover on or in such additions in contact with such building(s); but if any building herein described is protected by automatic sprinklers, this permit shall not be held to include the reconstruction or the enlargement of any building so protected, without the consent of this Company in writing. This permit does not waive or modify any of the terms or conditions of the Automatic Sprinkler Clause (if any) attached to this policy.

This insurance shall not be prejudiced: (1) If the property covered hereunder is on ground not owned

by the Insured in fee simple; (2) If the interest of the Insured in said property, or any part thereof, is other than that of unconditional and sole ownership; (3) If any part of said property be or become encumbered by any mortgage, or other encumbrance, or by the making of a contract of sale thereof: (4) If foreclosure proceedings be commenced or notice of sale be given in regard to any property insured hereunder; (5) By any act or neglect of the owner of the building if the Insured is not the owner thereof, or by any act or neglect of any occupant of the building (other than the named Insured), when such act or neglect of the owner or occupant is not within the control of the named Insured; (6) By failure of the named Insured to comply with any warranty or condition contained in any form, rider or endorsement attached to this policy with regard to any portion of the premises over which the named Insured has no control; nor (7) shall any insurance hereunder on building(s) be prejudiced by any error in stating the name, number, street or location of such building(s).

24. Lightning Clause: Except as Herein Provided, This Policy Also Covers Direct Loss or Damage Caused by Lightning (Meaning Thereby the Commonly Accepted Use of the Term "Lightning") Whether Fire Ensues or not, Subject in All Other Respects to the Terms and Conditions of This Policy; Provided, However, That if There Shall be Any Other Insurance on the Described Property This Company Shall Be Liable Only Pro Rata With

Such Other Insurance for Any Direct Loss by Lightning Whether Such Other Insurance Be Against Direct loss by Lightning or Not.

This Lightning Clause Does Not Increase the the Amount or Amounts of Insurance Provided in This Policy.

25. Electrical Apparatus Clause: If Electrical Appliances or Devices (Including Wiring) are Covered Under This Policy, This Company Shall not be Liable for Any Electrical Injury or Disturbance to the Said Electrical Appliances or Devices (Including Wiring) Caused by Electrical Currents Artifically Generated Unless Fire Ensues, and if Fire Does Ensue This Company Shall be liable Only for Its Proportion of Loss or Damage Caused by Such Ensuing Fire.

FORM 201 (JULY 1944) CALIFORNIA

EXTENDED COVERAGE ENDORSEMENT

(PERILS OF WINDSTORM, HAIL, EXPLOSION, RIOT, RIOT ATTENDING A STRIKE, CIVIL COMMOTION, AIRCRAFT, VEHICLES, SMOKE, EXCEPT AS HEREINAFTER PROVIDED, AND WAIVER OF FALLEN BUILDING CLAUSE)

Rate for extended coverage .110

In consideration of $ 11.20 premium, and subject to provisions and stipulations hereinafter referred to as "provisions" herein and in the policy to which this endorsement is attached, including riders and endorsements thereon, the coverage of this policy is extended to include direct loss by WINDSTORM, HAIL, EXPLOSION, RIOT, RIOT ATTENDING A STRIKE, CIVIL COMMOTION, AIRCRAFT, VEHICLES, AND SMOKE.

THIS ENDORSEMENT DOES NOT INCREASE THE AMOUNT OR AMOUNTS OF INSURANCE PROVIDED IN THE POLICY TO WHICH IT IS ATTACHED.

If this policy covers on two or more items, the provisions of this endorsement shall apply to each item separately

SUBSTITUTION OF TERMS: In the application of the provisions of this policy, including riders and endorsements (but not this endorsement), to the perils covered by this Extended Coverage Endorsement, wherever the word "fire" appears there shall be substituted therefor the peril involved or the loss caused thereby, as the case requires.

APPORTIONMENT CLAUSE: THIS COMPANY SHALL NOT BE LIABLE FOR A GREATER PROPORTION OF ANY LOSS FROM ANY PERIL OR PERILS INCLUDED IN THIS ENDORSEMENT THAN (1) THE AMOUNT OF INSURANCE UNDER THIS POLICY BEARS TO THE WHOLE AMOUNT OF FIRE INSURANCE COVERING THE PROPERTY, WHETHER VALID OR NOT AND WHETHER COLLECTIBLE OR NOT, AND WHETHER OR NOT SUCH OTHER FIRE INSURANCE COVERS AGAINST THE ADDITIONAL PERIL OR PERILS INSURED HEREUNDER, (2) NOR FOR A GREATER PROPORTION THAN THE AMOUNT OF INSURANCE UNDER THIS POLICY BEARS TO THE AMOUNT OF ALL INSURANCE, WHETHER VALID OR NOT AND WHETHER COLLECTIBLE OR NOT, COVERING IN ANY MANNER SUCH LOSS; FURTHERMORE, IF THERE BE INSURANCE OTHER THAN FIRE INSURANCE COVERING ANY ONE OR MORE OF THE PERILS CAUSING LOSS HEREUNDER, COVERING SPECIFICALLY ANY INDIVIDUAL UNIT OF PROPERTY INVOLVED IN THE LOSS, ONLY SUCH PROPORTION OF THE INSURANCE UNDER THIS POLICY SHALL APPLY TO SUCH UNIT SPECIFICALLY INSURED AS THE VALUE OF SUCH UNIT SHALL BEAR TO THE TOTAL VALUE OF ALL THE PROPERTY COVERED UNDER THIS POLICY, WHETHER SUCH OTHER INSURANCE CONTAINS A SIMILAR CLAUSE OR NOT.

GLASS CLAUSE: IT IS EXPRESSLY STIPULATED AS APPLICABLE TO ALL PERILS INCLUDED IN THIS ENDORSEMENT THAT ONLY SUCH PROPORTION OF THE INSURANCE UNDER THIS POLICY ON ANY BUILDING COVERS ON PLATE, STAINED, LEADED OR CATHEDRAL GLASS THEREIN AS THE VALUE OF SUCH GLASS WHICH IS DAMAGED BEARS TO THE TOTAL VALUE OF SAID BUILDING.

WAR RISK EXCLUSION CLAUSE: THIS COMPANY SHALL NOT BE LIABLE FOR LOSS BY ANY OF THE PERILS INSURED AGAINST IN THIS ENDORSEMENT CAUSED, DIRECTLY OR INDIRECTLY, BY: (A) ENEMY ATTACK BY ARMED FORCES, INCLUDING ACTION TAKEN BY MILITARY, NAVAL OR AIR FORCES IN RESISTING AN ACTUAL OR AN IMMEDIATELY IMPENDING ENEMY ATTACK; (B) INVASION; (C) INSURRECTION; (D) REBELLION; (E) REVOLUTION; (F) CIVIL WAR; (G) USURPED POWER.

WAIVER OF POLICY PROVISIONS: A claim for loss from perils included in this endorsement shall not be barred because building is not on ground owned by the Insured in fee simple, factory operations have ceased, of change of occupancy, of existence of encumbrance, of factory operations at night, nor because of vacancy or unoccupancy

Attached to and forming part of Policy No. 4-24777

of the HARDWARE MUTUAL INSURANCE CO OF MINN.
Name of Insurance Company

issued at its SAN FRANCISCO, CALIFORNIA Agency. Dated SEPTEMBER 24, 1943

TRADE MARK STANDARD REG. U.S. PAT. OFF.
201
JULY 1944

V. J. Malone
Agent

THE PROVISIONS PRINTED ON THE BACK OF THIS FORM ARE HEREBY REFERRED TO AND MADE A PART HEREOF.

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PROVISIONS APPLICABLE ONLY TO WINDSTORM AND HAIL: THIS COMPANY SHALL NOT BE LIABLE FOR LOSS CAUSED DIRECTLY OR INDIRECTLY BY (A) FROST OR COLD WEATHER OR (B) SNOWSTORM, TIDAL WAVE, HIGH WATER OR OVERFLOW, WHETHER DRIVEN BY WIND OR NOT.

THIS COMPANY SHALL NOT BE LIABLE FOR LOSS TO THE INTERIOR OF THE BUILDING OR THE INSURED PROPERTY THEREIN CAUSED, (A) BY RAIN, SNOW, SAND OR DUST, WHETHER DRIVEN BY WIND OR NOT, UNLESS THE BUILDING INSURED OR CONTAINING THE PROPERTY INSURED SHALL FIRST SUSTAIN AN ACTUAL LOSS TO ROOF OR WALLS BY THE DIRECT FORCE OF WIND OR HAIL AND THEN SHALL BE LIABLE FOR LOSS TO THE INTERIOR OF THE BUILDING OR THE INSURED PROPERTY THEREIN AS MAY BE CAUSED BY RAIN, SNOW, SAND OR DUST ENTERING THE BUILDING THROUGH OPENINGS IN THE ROOF OR WALLS MADE BY DIRECT ACTION OF WIND OR HAIL OR (B) BY WATER FROM SPRINKLER EQUIPMENT OR OTHER PIPING, UNLESS SUCH EQUIPMENT OR PIPING BE DAMAGED AS A DIRECT RESULT OF WIND OR HAIL.

UNLESS LIABILITY THEREFOR IS ASSUMED IN THE FORM ATTACHED TO THIS POLICY, OR BY ENDORSEMENT HEREON, THIS COMPANY SHALL NOT BE LIABLE FOR DAMAGE TO THE FOLLOWING PROPERTY: (A) GRAIN, HAY, STRAW OR OTHER CROPS OUTSIDE OF BUILDINGS OR (B) WINDMILLS, WINDPUMPS OR THEIR TOWERS, CLOTH AWNINGS, SIGNS, METAL SMOKESTACKS, TEMPORARY OR BOARD ROOF ADDITIONS, OR (C) BUILDINGS (OR THEIR CONTENTS) IN PROCESS OF CONSTRUCTION OR RECONSTRUCTION UNLESS ENTIRELY ENCLOSED AND UNDER ROOF WITH ALL OUTSIDE DOORS AND WINDOWS PERMANENTLY IN PLACE.

PROVISIONS APPLICABLE ONLY TO EXPLOSION: THIS COMPANY SHALL NOT BE LIABLE FOR LOSS BY EXPLOSION ORIGINATING WITHIN STEAM BOILERS, STEAM PIPES, STEAM TURBINES, STEAM ENGINES, FLY-WHEELS, LOCATED IN THE BUILDING(S) INSURED OR IN BUILDING(S) CONTAINING THE PROPERTY INSURED.

ANY OTHER EXPLOSION CLAUSE MADE A PART OF THIS POLICY IS SUPERSEDED BY THIS ENDORSEMENT.

PROVISIONS APPLICABLE ONLY TO RIOT, RIOT ATTENDING A STRIKE AND CIVIL COMMOTION: Loss by riot, riot attending a strike or civil commotion shall include direct loss by acts of striking employees of the owner or tenant(s) of the described building(s) while occupied by said striking employees and shall also include direct loss from pillage and looting occurring during and at the immediate place of a riot, riot attending a strike or civil commotion. THIS COMPANY SHALL NOT BE LIABLE, HOWEVER, FOR LOSS RESULTING FROM DAMAGE TO OR DESTRUCTION OF THE DESCRIBED PROPERTY OWING TO CHANGE IN TEMPERATURE OR INTERRUPTION OF OPERATIONS RESULTING FROM RIOT OR STRIKE OR OCCUPANCY BY STRIKING EMPLOYEES OR CIVIL COMMOTION, WHETHER OR NOT SUCH LOSS, DUE TO CHANGE IN TEMPERATURE OR INTERRUPTION OF OPERATIONS, IS COVERED BY THIS POLICY AS TO OTHER PERILS.

PROVISIONS APPLICABLE ONLY TO LOSS BY AIRCRAFT AND VEHICLES: Loss by "aircraft" includes direct loss by objects falling therefrom. The term "vehicles," as used in this endorsement, means vehicles running on land or tracks. THIS COMPANY SHALL NOT BE LIABLE, HOWEVER, FOR LOSS (A) BY ANY VEHICLE OWNED OR OPERATED BY THE INSURED OR BY ANY TENANT OF THE DESCRIBED PREMISES; (B) TO AIRCRAFT OR VEHICLES INCLUDING CONTENTS OTHER THAN STOCKS OF AIRCRAFT OR VEHICLES IN PROCESS OF MANUFACTURE OR FOR SALE; (C) TO FENCES, DRIVEWAYS, SIDEWALKS OR LAWNS.

PROVISIONS APPLICABLE TO SMOKE: THE TERM "SMOKE" AS USED IN THIS ENDORSEMENT MEANS ONLY SMOKE DUE TO A SUDDEN, UNUSUAL AND FAULTY OPERATION OF ANY HEATING OR COOKING UNIT, ONLY WHEN SUCH UNIT IS CONNECTED TO A CHIMNEY BY A SMOKE PIPE, AND WHILE IN OR ON THE PREMISES DESCRIBED IN THIS POLICY, EXCLUDING, HOWEVER, SMOKE FROM FIREPLACES OR INDUSTRIAL APPARATUS.

PROVISIONS APPLICABLE ONLY WHEN THIS ENDORSEMENT IS ATTACHED TO A POLICY COVERING BUSINESS INTERRUPTION (USE AND OCCUPANCY), EXTRA EXPENSE, RENTS, LEASEHOLD INTEREST OR PROFITS AND COMMISSIONS: WHEN THIS ENDORSEMENT IS ATTACHED TO A POLICY COVERING BUSINESS INTERRUPTION (USE AND OCCUPANCY), EXTRA EXPENSE, RENTS, LEASEHOLD INTEREST, PROFITS AND COMMISSIONS, THE TERM "DIRECT," AS APPLIED TO LOSS, MEANS LOSS, AS LIMITED AND CONDITIONED IN SUCH POLICY, RESULTING FROM DIRECT LOSS TO DESCRIBED PROPERTY FROM PERILS INSURED AGAINST; AND, WHILE THE BUSINESS OF THE OWNER OR TENANT(S) OF THE DESCRIBED BUILDING(S) IS INTERRUPTED BY A STRIKE AT THE DESCRIBED LOCATION, THIS COMPANY SHALL NOT BE LIABLE FOR ANY LOSS OWING TO INTERFERENCE BY ANY PERSON(S) WITH REBUILDING, REPAIRING OR REPLACING THE PROPERTY DAMAGED OR DESTROYED OR WITH THE RESUMPTION OR CONTINUATION OF BUSINESS.

FALLEN BUILDING CLAUSE WAIVER: The provisions, if any, in this policy to the effect that if the building or any part thereof fall, except as the result of fire, all insurance by this policy shall immediately cease, are hereby waived.

NOTE: NOTHING CONTAINED IN THE FOREGOING CLAUSE ENTITLED "FALLEN BUILDING CLAUSE WAIVER" SHALL RENDER THIS COMPANY LIABLE IN ANY WAY FOR LOSS OR DAMAGE CAUSED BY EARTHQUAKE, UNLESS FIRE OR ANY PERIL SPECIFICALLY INSURED AGAINST BY THIS ENDORSEMENT, SHALL ENSUE, AND IN THAT EVENT FOR THE DAMAGE ONLY BY FIRE OR BY SUCH PERIL SPECIFICALLY INSURED AGAINST BY THIS ENDORSEMENT, BUT SUBJECT TO ALL THE TERMS, CONDITIONS AND PROVISIONS OF THIS POLICY INCLUDING THIS ENDORSEMENT.

EXHIBIT B

[Exhibit B is identical to Exhibit A attached to Amended Answer of Defendants Harold A. Goldman, Myrtle Goldman, Harold F. Baruh and Doris G. Baruh and is set out in full at pages 18 to 25 of this printed record.]

EXHIBIT C

[Exhibit C is identical to Exhibit B attached to Amended Answer of Defendants Harold A. Goldman, Myrtle Goldman, Harold F. Baruh and Doris G. Baruh and is set out in full at pages 25 to 29 of this printed record.]

[Endorsed]: Filed January 5, 1951.

[Title of District Court and Cause.]

SUPPLEMENT TO "STIPULATION TO ADMIT CERTAIN FACTS"

It Is Stipulated that there may be added to Paragraph VII of "Stipulation to Admit Certain Facts" on file herein, the following:

"That said Security Insurance Company admitted liability in full under said policy of insurance and paid thereunder to Harold F. Baruh and Harold A. Goldman the sum of Twenty Five Thousand Dollars ($25,000.00), and restained, as provided by the policy, the sum of Eleven Thousand Seven Hundred Forty Three and 89/100 Dollars ($11,743.89), to be paid to said parties at a later date; that of

the Twenty Five Thousand Dollars ($25,000.00), paid to the defendants, Harold F. Baruh and Harold A. Goldman as aforementioned, they expended the sum of One Thousand One Hundred Seventy Three and 89/100 Dollars ($1,173.89), to remove the debris upon the property caused by the burned buildings, and the balance, at the request of the defendant and cross-complainant, Mildred A. Dunwoody, was placed by said parties in a savings account in a bank in San Francisco, to be withdrawn only upon the signatures of Mildred A. Dunwoody and Harold F. Baruh or Harold A. Goldman.

Dated this 31st day of December, 1950.

BERT W. LEVIT,
DAVID C. BOGERT,
LONG & LEVIT,
By /s/ DAVID C. BOGERT,
Attorneys for Plaintiff,

OSCAR SAMUELS and
TEVIS JACOBS,
By /s/ OSCAR SAMUELS,
Attorneys for Defendants Harold A. Goldman, Myrtle Goldman, Harold F. Baruh and Doris G. Baruh.

PETERS and PETERS,
By /s/ JAMES D. PETERS,
Attorneys for Defendant and Cross-Complainant Mildred A. Dunwoody.

[Endorsed]: Filed January 5, 1951.

[Title of District Court and Cause.]

INTERROGATORIES PROPOUNDED BY PLAINTIFF

Now Comes Hardware Mutual Insurance Co., of Minnesota, a corporation, Plaintiff and Cross-Defendant herein, and requires Mildred A. Dunwoody, Defendant and Cross-Complainant herein, to answer separately and fully in writing under oath the following interrogatories filed pursuant to Rule 33 of the Federal Rules of Civil Procedure:

Interrogatory No. 1. At whose request did you sign that certain agreement, dated as of 16 April, 1946, between you as Landlord and H. A. Goldman, Myrtle Goldman, H. F. Baruh, and Doris G. Baruh, as Tentant, a copy of which is incorporated as Exhibit "B" in the Stipulation to Admit Certain Facts on file in this action?

Interrogatory No. 2. Did the persons named as Tenant in said agreement, or anyone on their behalf, state the purpose for which said agreement was prepared?

Interrogatory No. 3. If your answer to the preceding interrogatory is in the affirmative, please state the names of the persons and the purpose of the agreement as explained to you by them.

Interrogatory No. 4. Did you delay signing the agreement referred to above as Exhibit "B" until Harold Goldman and Harold Baruh had signed, or agreed to sign, that certain agreement between you

and them dated 23 April, 1946, a copy of which is incorporated as Exhibit "C" in the Stipulation to Admit Certain Facts on file in this action?

Interrogatory No. 5. Describe the negotiations preceding the execution by you of the agreements identified hereinabove as Exhibits "B" and "C."

Interrogatory No. 6. Was it your intention and purpose, at all times mentioned above, that the other defendants in this action remain bound by that provision in paragraph 12 of your lease agreement with them requiring that the buildings leased to them under said lease be restored by them at their own expense without unnecessary delay if they were partially or totally destroyed by fire?

Interrogatory No. 7. If your answer to the preceding interrogatory is in the affirmative, did you notify Harold A. Goldman or Harold F. Baruh before or at the time of signing the agreement identified hereinabove as Exhibit "B" that such was your intention and purpose?

Interrogatory No. 8. Did you, prior to 8 April, 1949, make any agreements with the other defendants, or any of them, relative to their obligation to rebuild the buildings leased by you to them, other than the agreements referred to above as Exhibits "B" and "C"?

Interrogatory No. 9. If your answer to the preceding interrogatory is in the affirmative, state the substance of said agreements, the dates they were made, and whether they were oral or in writing.

Interrogatory No. 10. Did you, subsequent to 8 April, 1949, make any agreements with the other defendants, or any of them, relative to their obligation to rebuild the buildings leased by you to them, other than the agreements referred to above as Exhibits "B" and "C"?

Interrogatory No. 11. If your answer to the preceding interrogatory is in the affirmative, state the substance of said agreements, the dates they were made, and whether they were oral or in writing.

Interrogatory No. 12. It has been stipulated in this case that the reconstruction of the buildings here involved has been delayed by the other defendants with your consent and approval given in or about the month of June, 1950.

(a) State when said consent was given.

(b) Was said consent oral or in writing?

(c) Was said consent embodied in or given pursuant to an agreement?

(d) If it was, state the substance of said agreement, the date it was made, and whether it was oral or in writing.

Interrogatory No. 12. Has any agreement been made by you with the other defendants, or any of them, relative to the application of the proceeds of insurance policies to the reconstruction of the buildings leased by you to them?

Interrogatory No. 13. If your answer to the preceding interrogatory is in the affirmative, state the substance of said agreement, the date it was made, and whether it was oral or in writing.

Interrogatory No. 14. Have the other defendants paid rent to you since the destruction by fire on 8 April, 1949, of the buildings leased by you to them?

Interrogatory No. 15. If your answer to the preceding interrogatory is in the affirmative, state the amount of rent which has been paid.

Dated 9 January, 1951.

BERT W. LEVIT,

DAVID C. BOGERT,

LONG & LEVIT,

By /s/ DAVID C. BOGERT,

Attorneys for Plaintiff and Cross-Defendant, Hardware Mutual Insurance Co. of Minnesota, a corporation.

Affidavit of Service by Mail attached.

[Endorsed]: Filed January 30, 1951.

[Title of District Court and Cause.]

ANSWER TO INTERROGATORIES PROPOUNDED BY PLAINTIFF

State of California,
County of Butte—ss.

Mildred A. Dunwoody, having been duly sworn, makes the following answers to interrogatories propounded to her in the above-entitled case. Her answer to each interrogatory is:

1. Benjamin Unger.

2. Yes.

3. Mr. Unger stated that Montgomery Ward & Company was interested in obtaining the property and erecting a store building thereon, but that it would not accept an assignment of the original lease made on November 1, 1943, between myself as landlord and the Grand Rapids Furniture Company as tenants, which lease was later assigned to defendant herein, H. A. Goldman and H. F. Baruh, and that to secure Montgomery Ward as a tenant certain provisions of the lease would have to be deleted or revised, and Mr. Unger presented to me for my execution that certain agreement referred to herein as "Exhibit B."

4. At first I refused to sign the agreement dated April 16, 1946, (Exhibit "B"); if my recollection serves me right, while this matter was pending a representative of Montgomery Ward sought to interview me, but I refused to see him. Finally, however, after consulting with my attorney, I agreed to sign the agreement of April 16, 1946, which is referred to as "Exhibit B" herein, provided Mr. Goldman and Mr. Baruh signed an agreement which was prepared by my attorney and dated April 23, 1946, and is "Exhibit C"; I delayed signing the agreement "Exhibit B" until Mr. Goldman and Mr. Baruh had signed the agreement of April 23, 1946; these instruments were each acknowledged by me upon April 29, 1946.

5. The negotiations preceding the execution by me of the agreements (Exhibit "B" and Exhibit "C"), were as described in my preceding answer. When "Exhibit B" was presented, I refused to sign it. Mr. Unger pointed out that it was advantageous to have a building such as Montgomery Ward & Company would build located upon my property; I consulted my attorney, Jerome D. Peters, Sr., of Chico, and he suggested that he draw an agreement to be signed by Mr. Goldman and Mr. Baruh, and if it was signed, it would be all right for me to sign Exhibit "B," which agreement to be so drawn would require said parties individually and personally to perform all things required under the original lease of November 1, 1943. The main reason for the request of Mr. Goldman and Mr. Baruh was that in the event the Montgomery Ward building was destroyed by fire, and my building on the premises having been removed to build the Montgomery Ward building, I would have no funds available for rebuilding, and such a provision was most important to me.

6. Yes.

7. I cannot answer this definitely; there was a lapse of a number of days between the time that "Exhibit B" was presented to me for signing, and before I actually signed same; I have a faint recollection that I talked over the telephone concerning the matter with Mr. Baruh, but I cannot be positive of this; however, I did inform Mr. Unger who represented Mr. Baruh and Mr. Goldman in all of

the proceedings involved in these exhibits, that it was my intention that Mr. Goldman and Mr. Baruh should restore the building in the event of destruction by fire. My primary reason for requiring the signing of "Exhibit C" was for this very purpose, but I had in mind also that under the original lease, I could rebuild the building myself in the event of such a loss and use the insurance money recovered from fire policies placed on the buildings by Mr. Baruh and Mr. Goldman.

8. No.

9.

10. Yes, first my attorney wrote, asking them to rebuild, but then their attorney, Mr. Samuels, got in touch with my attorney, Jerome D. Peters, and stated that the Montgomery Ward lease deal showed signs of life again and that a representative from Montgomery Ward was coming out to see him in respect to the matter, and my attorney advised me to delay a demand to rebuild, and my attorney has informed me that he so advised Mr. Samuels.

11. This transaction was correspondence between Mr. Samuels and Mr. Peters, and verbal communications; these occurred toward the end of June, 1950.

12. (a) I believe the latter part of June, 1950.

(b) It was either oral or in the form of letters between counsel for respective parties.

(c) No.

12. I have been requested by Mr. Baruh and Mr. Goldman to apply the proceeds that I may receive from the Hardware Mutual Company's policy on the rebuilding of the destroyed buildings. I have neither told them that I would or would not. My insurance carrier, the Hardware Mutual, tells me in the first place that I haven't any insurance, and then tells me in the second place, that if I do have any insurance, it is something like $7,000.00 worth instead of the face value of the policy, which is $10,000.00; the buildings should be rebuilt; the lease provides that Mr. Goldman and Mr. Baruh will rebuild them. In this suit, however, they are claiming that they are not required to rebuild them. Even if they are required to rebuild them, I know nothing of Mr. Goldman's or Mr. Baruh's financial status. It is obvious that the buildings cannot be rebuilt for near the amount they could have been rebuilt when the fire happened, which was on October 8, 1948. My determination in the matter has not yet been formed and I am awaiting the termination of this proceeding to make a determination. If I have to pursue Mr. Goldman and Mr. Baruh legally and take another couple of years in doing so, it may be that I will take up my rights under the agreement to use the insurance taken on the building in the name of Mr. Goldman, Mr. Baruh and myself, and with it and my own insurance, if I get any, rebuild.

13.

14. Yes, on the real property, that is land.

15. $200.00 per month.

/s/ MILDRED A. DUNWOODY,
MILDRED A. DUNWOODY.

Subscribed and sworn to before me this 23rd day of January, 1951.

/s/ O. E. TRACY,
Notary Public,
Butte County, Calif.

My Commission Expires April 25, 1952.

[Endorsed]: Filed January 29, 1951.

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The above-entitled action came on regularly for trial before the above-entitled court sitting without jury, the Hon. Michael J. Roche presiding, upon the 20th day of February, 1951, in the court room of the above-entitled court, situated in the Post Office Building at 7th & Mission Streets, in the City of San Francisco, State of California; the action came on for trial upon the complaint of plaintiff and the amended answer and cross-complaint of the defendant, Mildred A. Dunwoody, and the amended answer of the defendants, Harold A. Goldman, Myrtle

Goldman, Harold F. Baruh and Doris G. Baruh, and upon the cross-complaint of the defendant, Mildred A. Dunwoody, cross-complainant, and the answer thereto of the plaintiff, Hardware Mutual Insurance Company of Minnesota, a corporation, cross-defendant. The plaintiff and cross-defendant was represented by the law firm of Long & Levit, through David C. Bogert; the defendant and cross-complainant, Mildred A. Dunwoody, was represented by the law firm of Peters and Peters, through Jerome D. Peters, and the defendants Harold A. Goldman, Myrtle Goldman, Harold F. Baruh and Doris G. Baruh, were represented by the law firm of Oscar Samuels and Tevis Jacobs, through Robert Sills; evidence, both oral and documentary, was introduced; theretofore there was filed in the action a "Stipulation to Admit Certain Facts" and a supplement thereto, which are marked Exhibit "1"; the taking of evidence having been completed and the matter having been submitted to the court for its determination, and the court being fully advised in the premises hereby finds the following facts to be true, to wit:

Findings of Fact

I.

That paragraphs I to XIV inclusive of the said "Stipulation to Admit Certain Facts" and the supplement thereto, on file herein, are true, and they are incorporated herein and made a part hereof.

II.

That it was stipulated in open court as a fact that at the time of the destruction of the said buildings by fire, the sound value thereof and their replacement value was in excess of the total amount of fire insurance carried upon said buildings, namely upwards of $46,795.00.

III.

That under the said policy of insurance carried by the defendant and cross-complainant, Mildred A. Dunwoody, with the plaintiff and cross-defendant, which policy was in the sum of $10,000.00, she sustained a total loss.

IV.

That the original lease of the premises involved was dated the first day of November, 1943, and under it the defendant, Mildred A. Dunwoody, leased the premises to the Grand Rapids Furniture Company for a term of fifty years, commencing January 1, 1944; that the interest of the said Grand Rapids Furniture Company, as lessee, was later transferred to the defendants, Harold A. Goldman, Myrtle Goldman, Harold F. Baruh and Doris G. Baruh, and they are the lessees of the premises described therein; as set forth in the "Stipulation of Facts" marked Exhibit "1," an instrument dated April 16, 1946, was entered into between the said Mildred Dunwoody and the said Goldmans and Baruhs, defendants, which purported to delete certain paragraphs from the terms of said original lease there was also an agreement dated April 23, 1946,

entered into between the said Mildred A. Dunwoody, defendant, and the said defendants, Harold A. Goldman and Harold F. Baruh, wherein they individually agreed to be bound by all the terms of the original lease, including those deleted by the agreement of April 16, 1946; that it is the intent of the two agreements said defendants be so bound: both agreements were delivered at one time to the said Goldmans and Baruhs by the said Mildred A. Dunwoody on the express condition that the said defendants were to be so bound; that these were delivered to the said Baruh and Goldman defendants by the defendant, Mildred A. Dunwoody, through one Ben Unger, the agent of said Baruhs and Goldmans, and while he was acting for said defendants within the course and scope of his employment; that they were delivered by letter to said Ben Unger, said agent, with instructions to deliver them only if it was the intent of the said defendant to be so bound; that the said Ben Unger delivered them to said defendants who executed them, and an executed copy of each was delivered by said Ben Unger to said Mildred A. Dunwoody by letter in which Mr. Unger stated that they protected her.

V.

That under the terms of the original lease of November 1, 1943, and in particular, under section 12 thereof, the lessees were obligated in the event the bulidings were destroyed by fire to restore the same at their own expense and without unnecessary delay; said paragraph was one of the paragraphs

deleted by the agreement of April 16, 1946; that it was revived as to the defendants Harold A. Goldman and Harold F. Baruh by the agreement of April 23, 1946; that as set forth in "Stipulation to Admit Certain Facts" the said Baruh and Goldman defendants carried a total fire insurance in the sum of $36,795.00 and by the supplement to "Stipulation to Amend Certain Facts" which is in evidence here with the original, it is stipulated that the said Baruh and Goldman defendants of said insurance have been paid $25,000.00 by the Security Insurance Company, and that said company retained, as provided by its policy, $11,743.89, to be paid to said parties at a later date; that of the $25,000.00 so paid, said Baruh and Goldman defendants expended $1,173.89 to remove the debris upon the property caused by the burned buildings and that the balance of the said $25,000.00 was placed by the parties in a savings account in a bank in San Francisco, to be withdrawn only upon the signatures of Mildred A. Dunwoody and Harold F. Baruh and Harold A. Goldman.

Conclusions of Law

From the foregoing findings of fact, the court concludes:

I.

That the defendant and cross-complainant, Mildred A. Dunwoody, is entitled to a judgment under her cross-complaint against the plaintiff and cross-defendant, Hardware Mutual Insurance Company of Minnesota, a corporation, in the sum of $10-

000.00 plus interest thereon at the rate of 7% per annum from January 21, 1950.

II.

That upon the payment of the foregoing judgment, the plaintiff and cross-defendant is not entitled to subrogate as against the defendants Harold F. Baruh, Doris G. Baruh, Harold A. Goldman or Myrtle Goldman, or any thereof.

III.

That the defendants Harold A. Goldman and Harold F. Baruh are legally bound by and to perform the obligations of the tenants of the premises upon which the buildings were destroyed by fire, and to restore the buildings destroyed by fire as provided in Paragraph 12 of the original lease of November 1st, 1943, and are similarly bound by all paragraphs of said lease.

IV.

That the defendants Mildred A. Dunwoody, Harold A. Goldman, Myrtle Goldman, Harold F. Baruh and Doris G. Baruh shall be entitled to their costs of suit herein incurred.

Dated: April 6th, 1951.

/s/ MICHAEL J. ROCHE,
Chief United States
District Judge.

[Endorsed]: Filed April 6, 1951.

In the Southern Division of the United States District Court for the Northern District of California

No. 29584

HARDWARE MUTUAL INSURANCE CO. OF MINNESOTA, a Corporation,

Plaintiff,

vs.

MILDRED A. DUNWOODY, HAROLD A. GOLDMAN, MYRTLE GOLDMAN, HAROLD F. BARUH, and DORIS G. BARUH,

Defendants.

MILDRED A. DUNWOODY,

Cross-Complainant,

vs.

HARDWARE MUTUAL INSURANCE CO. OF MINNESOTA, a Corporation,

Cross-Defendant.

JUDGMENT

This cause coming on regularly for trial before the above-entitled court, the Honorable Michael J. Roche presiding without a jury and the said matter being heard and tried upon the complaint of plaintiff and the amended answer and cross-complaint of the defendant and the amended answer of the defendants, Harold A. Goldman, Myrtle Goldman, Harold F. Baruh and Doris G. Baruh, and upon the cross-complaint of the defendant, Mildred A.

Dunwoody, cross-complainant, and the answer thereto of the plaintiff, Hardware Mutual Insurance Company of Minnesota, a corporation, cross-defendant, the plaintiff and cross-defendant being represented by the law firm of Long & Levit through David C. Bogert, Esq.; the defendant and cross-complainant, Mildred A. Dunwoody, being represented by the law firm of Peters & Peters, through Jerome D. Peters, Esq., and the defendants, Harold A. Goldman, Myrtle Goldman, Harold F. Baruh and Doris G. Baruh, being represented by the law firm of Oscar Samuels, through Robert Sills, Esq., and evidence, both oral and documentary being introduced and the matter having been submitted to the court for its decision, and the court having heretofore caused to be signed and filed its Findings of Fact and Conclusions of Law, and by reason thereof and the law,

It is hereby adjudged and decreed as follows, to wit:

I. That the defendant and cross-complainant, Mildred A. Dunwoody, have, and she is hereby granted, judgment against the plaintiff and cross-defendant, Hardware Mutual Insurance Company of Minnesota, a corporation, in the sum of Ten Thousand Dollars ($10,000.00), plus interest thereon at the rate of 7% per annum from January 21, 1950, and until paid, and for her costs of suit hereby taxed at the sum of $20.00.

II. That upon the payment by the plaintiff and cross-defendant, Hardware Mutual Insurance Com-

pany of Minnesota, a corporation, of the said sum of Ten Thousand Dollars ($10,000.00) to defendant and cross-complainant, Mildred A. Dunwoody, as adjudged in the preceding paragraph, said plaintiff and cross-defendant is not entitled to be subrogated to any of the rights of the said Mildred A. Dunwoody or at all, against the defendants Harold F. Baruh, Doris G. Baruh, Harold A. Goldman or Myrtle Goldman, or any thereof.

III. The defendants Harold A. Goldman and Harold F. Baruh are legally bound by and to perfrom the obligations of paragraph 12, and all the provisions of that certain lease dated November 1, 1943, in which the said premises and buildings described in paragraph V of plaintiff's complaint were leased by Mildred A. Dunwoody, defendant and cross-complainant herein, to the Grand Rapids Furniture Company for a period of fifty (50) years from January 1, 1944, and which lease was later and upon April 3, 1945, assigned by the Grand Rapids Furniture Company to the said defendants, Harold F. Baruh and Harold A. Goldman, which said lease is referred to and described in the "Stipulation to Admit Certain Facts" filed herein and marked Exhibit "I," and as provided by the provisions of said paragraph 12, said defendants are obligated to restore the buildings destroyed.

IV. That the defendants Harold A. Goldman, Myrtle Goldman, Harold F. Baruh and Doris G. Baruh do have and recover of and from plaintiff and cross-defendant, Hardware Mutual Insurance

Company of Minnesota, a corporation, their costs and expenses incurred in said action amounting to the sum of $20.00.

Dated: April 6th, 1951.

/s/ MICHAEL J. ROCHE,
Chief U. S. District Judge.

[Endorsed]: Filed April 6, 1951.

Entered in Civil Docket April 9, 1951.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice is hereby given that Hardware Mutual Insurance Co. of Minnesota, a corporation, plaintiff and cross-defendant above named, hereby appeals to the United States Court of Appeals for the Ninth Circuit from those portions of the final judgment entered in this action on 9 April, 1951, reading as follows:

> "It is hereby adjudged and decreed as follows, to wit:
>
> "I. That the defendant and cross-complainant, Mildred A. Dunwoody, have, and she is hereby granted, judgment against the plaintiff and cross-defendant, Hardware Mutual Insurance Company of Minnesota, a corporation, in the sum of Ten Thousand Dollars ($10,000.00), plus interest thereon at the rate of 7% per annum from January 21, 1950, and until paid,

and for her costs of suit hereby taxed at the sum of $20.

"II. That upon the payment by the plaintiff and cross-defendant, Hardware Mutual Insurance Company of Minnesota, a corporation, of the said sum of Ten Thousand Dollars ($10,000.00) to defendant and cross-complainant, Mildred A. Dunwoody, as adjudged in the preceding paragraph, said plaintiff and cross-defendant is not entitled to be subrogated to any of the rights of the said Mildred A. Dunwoody or at all, against the defendants Harold F. Baruh, Doris G. Baruh, Harold A. Goldman or Myrtle Goldman, or any thereof.

"IV. That the defendants Harold A. Goldman, Myrtle Goldman, Harold F. Baruh and Doris G. Baruh do have and recover of and from plaintiff and cross-defendant, Hardware Mutual Insurance Company of Minnesota, a corporation, their costs and expenses incurred in said action amounting to the sum of $20."

BERT W. LEVIT,

DAVID C. BOGERT,

LONG & LEVIT,

By /s/ DAVID C. BOGERT,

Attorney for Appellant Hardware Mutual Insurance Co. of Minnesota.

[Endorsed]: Filed April 26, 1951.

[Title of District Court and Cause.]

SUPERSEDEAS BOND ON APPEAL

Know All Men by These Presents:

That we, Hardware Mutual Insurance Co. of Minnesota, a corporation, the above-named plaintiff and cross-defendant, as Principal, and Glens Falls Indemnity Co., an insurance corporation organized and existing under the laws of the State of New York, as Surety, are held and firmly bound unto Mildred A. Dunwoody, defendant and cross-complainant, and Harold A. Goldman, Myrtle Goldman, Harold F. Baruh, and Doris G. Baruh, defendants, in the full and just sum of Twelve Thousand Five Hundred Dollars ($12,500.00) to be paid to the said cross-complainant and defendants, their certain attorneys, executors, administrators, or assigns; to which payment to be well and truly made we bind ourselves, our successors and assigns, jointly and severally by these presents.

Sealed with our seals and dated this 19th day of April, 1951.

Whereas, on April 9, 1951, a judgment was rendered in favor of the above-named obligees and against the said Hardware Mutual Insurance Co. of Minnesota, and the said Hardware Mutual Insurance Co. of Minnesota having filed or being about to file in said Court a notice of appeal to reverse the judgment in the aforesaid suit, on appeal to the United States Court of Appeals for the Ninth Circuit; and

Whereas, the said plaintiff and cross-defendant desires a stay of all proceedings in the above-entitled cause until the determination of the said appeal;

Now Therefore, the condition of this obligation is such that if the said Hardware Mutual Insurance Co. of Minnesota, as appellant, shall prosecute its appeal with effect and shall satisfy the said judgment in full together with costs, interest and damage for said delay if said appeal is dismissed or if the judgment is affirmed, and shall satisfy in full such modification of the judgment and costs, interest and damages as may be adjudged and awarded by the appellate court, then this obligation to void; otherwise to remain in full force and effect.

HARDWARE MUTUAL INSURANCE CO. OF MINNESOTA,

[Seal] By /s/ P. O. WETTLESON,
Resident Assistant
Secretary.

GLENS FALLS INDEMNITY CO.,

By /s/ DONALD J. MOLLBERG,
Attorney.

The foregoing bond is hereby approved and is to stand as a supersedeas until the final determination of the appeal.

/s/ MICHAEL J. ROCHE,
District Judge.

State of California,
City and County of San Francisco—ss.

On this 19th day of April in the year One Thousand Nine Hundred and Fifty-one before me, Alice E. Lowrie, a Notary Public in and for the said City and County of San Francisco, residing therein, duly commissioned and sworn, personally appeared Donald J. Mollberg, known to me to be the Attorney of the Glens Falls Indemnity Company, the Corporation that executed the within instrument, and known to me to be the person who executed the said instrument on behalf of the Corporation therein named and acknowledged to me that such Corporation executed the same.

In Witness Whereof, I have hereunto set my hand and affixed my official seal in the City and County of San Francisco the day and year in this certificate first above written.

[Seal] /s/ ALICE E. LOWRIE,
Notary Public in and for the City and County of San Francisco, State of California.

My Commission Expires May 23, 1952.

State of California,
City and County of San Francisco—ss.

On this 19th day of April, 1951, before me Josephine Limpert, a Notary Public, in and for the City and County of San Francisco, residing therein, duly commissioned and sworn, personally appeared P. O. Wettleson, known to me to be the Resident Assistant Secretary of Hardware Mutual Insurance

Co. of Minnesota, a corporation, and also known to me to be the person who executed the within instrument on behalf of said corporation, and he acknowledged to me that such corporation executed the same.

In Witness Whereof, I have hereunto set my hand and affixed my official Seal at my office in said City and County of San Francisco the day and year in this certificate first above written.

[Seal] /s/ JOSEPHINE LIMPERT,
Notary Public in and for the City and County of San Francisco, State of California.

My Commission Expires September 8, 1954.

[Endorsed]: Filed April 26, 1951.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK TO RECORD ON APPEAL

I, C. W. Calbreath, Clerk of the United States District Court for the Northern District of California, do hereby certify that the foregoing documents, listed below are the originals filed in this Court, or true copies of orders entered in this Court, in the above-entitled case and that they constitute the record on appeal herein as designated by the attorneys for the appellant:

Complaint for declaratory relief.

Amended answer of Defendants Harold A. Gold-

man, Myrtle Goldman, Harold F. Baruh and Doris G. Baruh.

Amended answer and cross-complaint of Defendant Mildred A. Dunwoody.

Answer to cross-complaint.

Order that answer to cross-complaint stand as answer to the amended cross-complaint of Mildred A. Dunwoody.

Stipulation to admit certain facts.

Supplement to "Stipulation to admit certain facts."

Interrogatories propounded by plaintiff.

Answer to interrogatories propounded by plaintiff.

Findings of fact and conclusions of law.

Judgment.

Notice of appeal.

Supersedeas bond on appeal.

Designation of contents of record on appeal.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said District Court this 4th day of June, 1951.

C. W. CALBREATH,
Clerk.

[Seal] /s/ C. W. TAYLOR,
Deputy Clerk.

[Endorsed]: No. 12960. United States Court of Appeals for the Ninth Circuit. Hardware Mutual Insurance Co. of Minnesota, a Corporation, Appellant, vs. Mildred A. Dunwoody, Harold A. Goldman, Myrtle Goldman, Harold F. Baruh and Doris G. Baruh, Appellees. Transcript of Record. Appeal from the United States District Court for the Northern District of California, Southern Division.

Filed June 4, 1951.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the Ninth Circuit.

In the United States Circuit Court of Appeals
For the Ninth Circuit

No. 12960

HARDWARE MUTUAL INSURANCE CO. OF MINNESOTA, a Corporation,

Appellant,

vs.

MILDRED A. DUNWOODY, HAROLD A. GOLDMAN, MYRTLE GOLDMAN, HAROLD F. BARUH, and DORIS G. BARUH,

Appellees.

STATEMENT OF POINTS TO BE RELIED UPON ON APPEAL AND DESIGNATION OF RECORD MATERIAL TO CONSIDERATION OF APPEAL

Now Comes appellant above named and, pursuant to subparagraph 6 of Rule 19 of the Rules of this Court, makes this statement of the points upon which it intends to rely on the appeal herein, and also makes the following designation of the record which it thinks material to the consideration thereof:

I.

Points

1. The court erred in finding and holding that upon payment of $10,000 by appellant to appellee Mildred A. Dunwoody, appellant is not entitled to be subrogated to any of the rights of the said appellee or at all, against the appellees Harold F.

Baruh, Doris G. Baruh, Harold A. Goldman or Myrtle Goldman, or any of them.

2. The court erred in failing to find that the actions of appellee Mildred A. Dunwoody in consenting to and approving the delay by the other appellees in reconstructing the buildings destroyed by fire seriously prejudiced or destroyed appellant's right of subrogation against said other appellees.

3. The court in finding and holding that appellee Mildred A. Dunwoody is entitled to a judgment against appellant in the sum of $10,000 plus interest thereon at the rate of 7% per annum from January 21, 1950.

II.

Designation

Appellant designates the following portions of the record as those which are material to the consideration of this appeal, to wit:

1. Plaintiff's Complaint for Declaratory Relief.
2. Amended Answer of Defendants Harold A. Goldman, Myrtle Goldman, Harold F. Baruh and Doris G. Baruh.
3. Amended Answer and Cross-Complaint of Defendant and Cross-Complainant Mildred A. Dunwoody.
4. Answer to Cross-Complaint.
5. Minute Order made 20 February, 1951, permitting Answer to Cross-Complaint to stand as an Answer to the Amended Cross-Complaint.
6. Stipulation to Admit Certain Facts.

7. Supplement to "Stipulation to Admit Certain Facts."

8. Interrogatories Propounded by Plaintiff to Defendant and Cross-Complainant.

9. Answers to Interrogatories Propounded by Plaintiff.

10. Findings of Fact and Conclusions of Law prepared and entered by the court on 6 April, 1951.

11. Judgment, entered 6 April, 1951.

12. Notice of Appeal, with date of filing.

13. Supersedeas Bond on Appeal, with date of filing.

14. Designation of Contents of Record on Appeal.

Certificate of clerk. [In pencil.]

Dated: San Francisco, California, 7 June, 1951.

BERT W. LEVIT,

DAVID C. BOGERT,

LONG & LEVIT,

By /s/ DAVID C. BOGERT,
Attorneys for Appellant.

Affidavit of Service by Mail attached.

[Endorsed]: Filed June 7, 1951.